(22,305.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 384.

GABRIEL DIAZ, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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1 In the Supreme Court of the United States.

GABRIEL DIAZ, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Supreme Court of the Philippine Islands.

Proceedings Had in the Justice Court of the Town of San Carlos, Province of Occidental Negros, Philippine Islands, in the Court of First Instance of the said Province, and in the Supreme Court of the Philippine Islands.

THE UNITED STATES

vs.

GABRIEL DIAZ.

Be it remembered that heretofore, to-wit, on the 27th day of June, 1906, Maria Condeno, a resident of the Town of San Carlos, Province of Occidental Negros, Philippine Islands, appeared before the Justice of the Peace of the said town and made the following statement under oath:

"THE UNITED STATES OF AMERICA,
Philippine Islands:

"Appearance:—In the Justice Court of San Carlos this 27th day of June, 1906, before me, the undersigned authority, Pelagio
2 Carbajosa, Justice of the Peace of the said municipality, personally appeared Maria Condeno, a native of Dumalag, Province of Capiz, and a resident of this municipality 40 years of age, exhibiting no certificate of registration on account of her sex, and, having been first duly sworn in accordance with the law, deposed and said that yesterday at about 5 o'clock in the afternoon, and within the jurisdiction of the hacienda of Sugbongcogon of this municipality, her son-in-law, Cornelio Alcanzaren, died as the result of the ill treatment received by him at the hands of Gabriel Diaz since the 30th of May of the present year, of which fact this court is cognizant, having heretofore investigated the matter, wherefore deponent brings these facts to the attention of the court, with the request that proper action be taken. Deponent does not sign for the reason that she does not know how to write but has put her mark to her name in my presence, to which I certify."

(Signed) her "MARIA x CONDENO. mark

(Signed) "PELAGIO CARBAJOSA,
Justice of the Peace."

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Justice Court of San Carlos this 27th Day of June, 1906.

Order.

3 Upon consideration of the foregoing statement, it is ordered that Maria Condeno file a regular complaint, in due form, setting out all the details of the occurrence relative to the death of her son-in-law, Cornelio Alcanzaren.

Given by me, the Justice of the Peace.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.

NOTE.—On the same date notice of the foregoing order was served on Maria Condeno, to which I certify.

(Signed) PELAGIO CARBAJOSA.
Justice of the Peace.

THE UNITED STATES OF AMERICA
versus
GABRIEL DIAZ.

Homicide.

In the Justice Court of San Carlos this 27th day of June, 1906. the undersigned, Maria Condeno, hereby accuses Gabriel Diaz of the crime of homicide committed as follows: That on the morning of the 30th of May, 1906, the accused threatened with physical violence the son-in-law of the undersigned, named Cornelio Alcanzaren, a fact which appears from the records of this court, and that as a result of the blows delivered by the accused against the said Alcanzaren and kicks received by the latter on various parts of his body, the said Alcanzaren died yesterday afternoon at 5 o'clock.

4 An act committed by the accused in violation of the law.

her
(Signed) MARIA x CONDENO.
mark

Subscribed and sworn to before me this 27th day of June, 1906. complainant exhibiting no registration certificate, she being exempt therefrom on account of her sex.

(Signed) PELAGIO CARBAJOSA.
Justice of the Peace.

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Justice Court of San Carlos, this 27th Day of June, 1906.

Order.

Upon consideration of the foregoing complaint it is ordered that a warrant issue for the arrest of Gabriel Diaz, directed to the Chief of Police of this town, commanding him at the same time to have the body of the deceased, Cornelio Alcanzaren, brought before this court for the purpose of holding the necessary inquest, and, this done, the court will make such further orders as may be proper in the premises.

(Signed) PELAGIO CARBAJOSA.
Justice of the Peace.
[COURT SEAL.]

5 Immediately upon the filing of the foregoing order a writ was issued to the Chief of Police for the arrest of the person of the accused, Gabriel Diaz, directing him to bring the said accused into court to be arraigned, and commanding the said Chief of Police to have the body of the deceased, Cornelio Alcanzaren, brought before the court as directed.

(Signed) PELAGIO CARBAJOSA.
Justice of the Peace.

NOTE.—The body of the deceased, Cornelio Alcanzaren, was brought into the court by his relatives at 3 o'clock this afternoon.

(Signed) PELAGIO CARBAJOSA.

Arraignment.

In the Justice Court of San Carlos on the 27th day of June, 1906, having before me, the undersigned, Justice of the Peace, the accused, Gabriel Diaz, he was duly informed of the charges contained in the complaint filed herein, having been given ample opportunity to examine the same carefully, and upon being questioned whether he pleaded guilty or not guilty to the said charges, he said that he pleaded not guilty.

In Witness Whereof, he signed hereon with me, to which I certify.

(Signed) PELAGIO CARBAJOSA.
(Signed) GABRIEL DIAZ.

6 *Order.*

In view of the result of the investigation held upon the complaint herein filed, and of the facts which appear of record in this court against Gabriel Diaz, it is ordered that he be temporarily detained and confined in the municipal jail of this town, unless he gives bail in the sum of $5.000.00, Philippine currency.

It is further ordered that the Chief of Police be accordingly notified and the defendant Gabriel Diaz turned over to him.

San Carlos, June 27, 1906.

(Signed) PELAGIO CARBAJOSA,
[COURT SEAL.] *Justice of the Peace.*

"Bail Bond.

"Whereas a complaint has been filed in the Justice Court of San Carlos Province of Occidental Negros, on the 27th of June, 1906, charging Gabriel Diaz with the crime of homicide, and the accused having been allowed bail in the sum of Five Thousand Dollars, Philippine currency,

"Now, Therefore, we, Ramon Lopez and Francisco C. Garcia, of San Carlos, Occidental Negros, do hereby promise, jointly and severally, that Gabriel Diaz will appear to answer the aforesaid complaint before the tribunal competent to try him, and that at
7 all times he will be ready to submit himself to the orders of the said court and that, in case of conviction, he will appear for sentence and deliver himself for the execution thereof, and in case that he should fail to comply with any of these obligations, to pay to the United States the sum of Five Thousand Dollars, Philippine currency.

(Signed) FRANCISCO C. GARCIA.
(Signed) RAMON LOPEZ."

"OCCIDENTAL NEGROS, PHILIPPINE ISLANDS,
Municipality of San Carlos.

Ramon Lopez and Francisco Garcia, having been first duly sworn, declared, each for himself, that he is a resident of the Philippine Islands, and that he is actually worth the sum specified in the foregoing bond, exclusive of all debts and obligations and property exempt from execution under this bond.

San Carlos, June 27, 1906.

(Signed) FRANCISCO C. GARCIA.
(Signed) R. LOPEZ."

"Subscribed and sworn to before me this 27th day of June, 1906, by Francisco Garcia, who exhibited to me his certificate of registration #228727, issued January 4, 1906, and by Ramon Lopez, who exhibited to me his certificate of registration #228709, issued January 3, 1906.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.

NOTE.—The accused, Gabriel Diaz, having given bail in the sum of Five Thousand Dollars, Philippine currency, as required by this court, it is ordered that he be discharged from custody.
8 San Carlos, June 27, 1906.

(Signed) PELAGIO CARBAJOSA,
[COURT SEAL.] *Justice of the Peace."*

"SAN CARLOS, *June* 27, 1906.

"To the Justice of the Peace of this town:

"The undersigned, Gabriel Diaz, who now stands charged before this court with the crime of homicide for the alleged killing of Cornelio Alcanzaren, respectfully asks the court that for the purpose of establishing the actual facts connected with the death of the said Cornelio Alcanzaren, in which the undersigned had no participation, an order be issued directing that the doctor of this town, Luis Suarez, make a post-mortem examination of the body of the deceased, your petitioner promising to defray all necessary expenses which may be incurred in connection therewith.

Very respectfully,

(Signed) GABRIEL DIAZ."

In the Justice Court of the Municipality of San Carlos this 27th day of June, 1906, at five o'clock p. m., and at a place near the municipal building, an examination was made of the body of
9 the deceased, Cornelio Alcanzaren, by me, the undersigned Justice of the Peace, in the presence of the president, the treasurer, and the municipal secretary of this town, and Captain Henry J. Hunt, the accused, Gabriel Diaz, and others being also present.

The examination developed the following facts: That the whole neck of the deceased was discolored, that the body exhibited a black spot on the right upper region of the abdomen and several black spots on the lower regions of the same. The deceased was identified by his mother-in-law, Maria Condeno, his wife, Gregoria Balcena, and his brother-in-law, Nemesio Balcena, and by me the undersigned Justice of the Peace.

In Witness Whereof, all the aforesaid persons sign these proceedings, with the exception of Captain Hunt, who was absent at the time from the courtroom, to all of which I the undersigned Justice of the Peace certify.

CRISOLOGO ARANETA.
HENRY C. HOYT.
AUGUSTIN CAGARA.
NEMESIO BALCENA.
GABRIEL DIAZ.
PELAGIO CARBAJOSA.
Justice of the Peace.

"The undersigned, a duly licensed physician of this town, hereby certifies that, at the request of Gabriel Diaz, and with the consent of the Justice of the Peace of this town, he examined the body of
10 Cornelio Alcanzaren, deceased, in so far as the external aspect of the corpse was concerned, and that from the said examination it appears:

First. That the body of the deceased was in an advanced stage of decomposition, the abdomen being very much swollen and this part of the body considerably discolored; also the lower limbs.

Second. That this discoloration is more noticeable near the neck,

on the back of which there is an erosion about the size of a twenty cent piece (peseta).

Third. That on the upper right side of the abdominal region the body showed a black spot, circular in shape, apparently caused by a limited contusion (something strange, it being on a soft part of the body) or by the application of some caustic substance.

Fourth. That as far as could be ascertained by feeling the body, there was no injury affecting the osseous system.

Fifth. That there was no sign of the retention of the urine in the bladder.

Sixth. That from the aforesaid symptoms and external signs, it is impossible to arrive at any definite conclusion as to the cause of the death of the deceased. Eusebio Alcanzaren.

In Witness Whereof, I have signed these presents at San Carlos, this 27th day of June, 1906.

(Signed)

DR. G. SUAREZ."

11

Telegram.

"SAN CARLOS, *June* 28, 1906.

"President, Provincial Board of Health, Bacolod:

Doctor urgently needed for post-mortem examination on body showing signs criminal violence. Local physician refuses to make same without government authority, answer.

JUSTICE OF THE PEACE."

Telegram.

"SAN CARLOS, *June* 28, 1906.

"Governor, Bacolod:

Body deceased Cornelio Alcanzaren shows signs criminal violence, according complaint died result ill treatment by Gabriel Diaz. Please order post-mortem examination right away.

PELAGIO CARBAJOSA,
Justice of the Peace."

Telegram.

"BACOLOD, *June* 28, 1906.

"Justice of the Peace, San Carlos:

All physicians and medical practitioners are bound to
12 assist courts whenever necessary. You may call on the local physician and order him to hold post-mortem examination on body of deceased.

JOCSON, *Judge."*

Telegram.

"BACOLOD, *June* 28, 1906.

"Justice of the Peace, San Carlos:

Order local physician there to hold post-mortem examination on body deceased and submit required report.

MORENO."

"In the Justice Court of San Carlos, this 28th day of June, 1906.

"Dr. Luis Garcia Suarez, San Carlos.

SIR: Pursuant to telegraphic instructions received by me from the provincial authorities, and especially at the request of Gabriel Diaz, I have the honor to request that you please make an examination of the body of the deceased, Cornelio Alcanzaren, which is now awaiting burial at the cemetery of this town.

Yours respectfully,

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace."

13 "P. S.—You will also submit to this court your report as to the result of the examination.

(Signed) CARBAJOSA."

"The Municipal Judge of this Town.

SIR: I have the honor to acknowledge the receipt of your communication of today, directing me to make an examination of the body of the deceased Cornelio Alcanzaren, and to inform you that in making such examination I must necessarily have the technical assistance of Andres Mondragon, wherefore I would request your honor to make an order directing that the said party assist me in the said examination.

San Carlos, June 28, 1906.

Respectfully,

(Signed) DR. SUAREZ."

"Court of the Justice of the Peace of San Carlos, June 28, 1906.

"Andres Mondragon, San Carlos.

SIR: I have the honor to transmit to you herewith copy of a letter from the physician of this town, Luis Garcia Suarez,
14 which said letter is as follows:

'The Municipal Judge of this Town.

SIR: I have the honor to acknowledge the receipt of your communication of today, directing me to make an examination of the body of the deceased Cornelio Alcanzaren, and to inform you that in making such examination I must necessarily have the technical assistance of Andres Mondragon, wherefore I would request your honor to make an order directing that the said party assist me in the said examination.

San Carlos, June 28, 1906.

Respectfully,

(Signed) DR. SUAREZ.'

with the request that you assist him in making said examination.

Respectfully,

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace."

"To the Justice of the Peace of this Town.

SIR: I beg to acknowledge the receipt of your communication of today and to inform you that I am unable to render any personal assistance as required in your said communication for the reason that my profession has nothing to do with post-mortem examinations.

This is all that I have to say in reply to your said communication.

San Carlos, June 28, 1906.

Yours respectfully,

(Signed) ANDRES MONDRAGON."

15 "Court of the Justice of the Peace of San Carlos.

"Dr. Luis G. Suarez, San Carlos. JUNE 28, 1906.

SIR: According to reply received from Andres Mondragon, I am informed in part as follows:

'To the Justice of the Peace of this Town.

SIR: I beg to acknowledge the receipt of your communication of today and to inform you that I am unable to render any personal assistance as required in your said communication for the reason that my profession has nothing to do with post-mortem examinations.'

all of which I have the honor to transmit to you for your information and guidance.

Respectfully,

(Signed) PELAGIO CARBAJOSA."

In the Court of the Justice of the Peace of the Municipality of San Carlos this 28th day of June, 1906, about 4:30 o'clock in the afternoon, the body of the deceased, Cornelio Alcanzaren, being at the municipal cemetery, the undersigned Justice of the Peace, accompanied by his assistants, directed Dr. Luis G. Suarez, a physician of this town, to hold a post-mortem examination upon the body of the said deceased, there being also present the accused, Gabriel Diaz, and the complaining witness, Maria Condeno, whereupon

16 Henry C. Hopkins, the physician's assistant, the said physician Luis G. Suarez being also present, proceeded pursuant to the latter's orders to make the examination, with the following result: The whole neck was black and the physician ordered that the body be opened by a longitudinal cut starting at a point immediately below the throat, and black blood issued from the right side; the abdomen was also opened and the bladder was apparently black, and the whole stomach also seemed to be discolored; the kidneys, the liver and the spleen absolutely black, and finally there was a black trail through the abdomen on the right side. The muscles were apparently in a normal condition but the

flesh naturally was in a decaying condition. Immediately after the examination was completed, the undersigned Justice of the Peace directed that the body of the deceased be buried at the municipal cemetery of this town in a grave 7 feet long by three feet wide and 6 hands deep, the grave being 88 yards from the northern boundary of the cemetery, 24 from the southern boundary, 80 from the eastern boundary and 12 from the western boundary of the cemetery, whereupon the proceedings were declared terminated, and in witness thereof all those present signed hereon with me, the Justice of the Peace, to which I certify.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.

(Signed) AGUSTIN ILAGAN.
SIMEON SEVILLA.
PEDRO CUENCO.
(Signature illegible.)

17 NOTE.—On account of the lateness of the hour this investigation will be continued tomorrow.

San Carlos, June 28, 1906.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Justice Court of San Carlos this 29th day of June, 1906, before me, the Justice of the Peace, personally appeared the parties hereto for the purpose of holding a preliminary hearing in this case, whereupon the complaining witness, MARIA CONDENO, whose personal status, age, residence and occupation already appear in the record, after being first duly sworn, testified as follows, in the presence of the accused, Gabriel Diaz:

Q. You are the complaining witness in this case. Please state fully all that you know concerning the death of your son-in-law, Cornelio Alcanzaren.

A. The cause of the death of my son-in-law, Cornelio Alcanzaren, was the ill treatment which he received at the hands of Gabriel Diaz, who is now here present.

Q. How do you know that the death of your son-in-law was brought about as a result of the blows received from the accused, Gabriel Diaz?

A. I know that the death of my son-in-law, Cornelio
18 Alcanzaren was the result of the blows received from the accused, Gabriel Diaz, because prior thereto he was not suffering from any disease; but after he was beaten by the accused he said that he had pains, first, on the right side, and, second, on the throat which prevented him from drinking water or swallowing any food to the extent that some times when he would attempt to drink water the same would come out through his nostrils, and, third, on the abdomen, near the navel.

Q. After your son-in-law, Cornelio Alcanzaren, was beaten by Gabriel Diaz, was he able to devote himself to his usual occupation, and when did this happen?

A. Never, and therefore I am unable to answer the latter part of the question. (The witness remarking that since her son-in-law was beaten by the accused he had been unable to get up or leave the house.)

Q. How is it that he was able to come to this court on the second of this month if it is true that, as you say, he was unable to get up after he was beaten by the accused?

A. He was compelled to come to this court for the purpose of informing himself as to the status of the complaint filed by me against the accused in this court on the 31st of May. He was surprised at the unnecessary delay in the proceedings and although he then came to the courthouse he was then suffering great bodily pain.

Q. After this trouble between your son-in-law, Cornelio Alcanzaren, and the accused, Gabriel Diaz, at the hacienda of San Antonio, where did you and your son-in-law, Cornelio Alcan-
19 zaren, stay?

A. We removed to the house of my brother, Fabian Aragon, on the banks of the River Guigalaman, within the hacienda of Sugbongcogon.

Q. After your son-in-law returned from this court to San Antonio, how many days was it before you removed to the house of your brother?

A. We only remained there one day and then removed to the house of my brother.

Q. While your son-in-law, Cornelio Alcanzaren, was sick in bed, was he attended by any physician, and if so, by whom?

A. He was not attended by any physician because he did not want one.

Q. Who else can testify to the fact that Cornelio Alcanzaren was not suffering from any other disease but that his death was solely brought about as a result of the beating in question?

A. Matias Ferrer, Tomas, Crisanto, and Estanislao, all of them residents of the hacienda of Sugbongcogon. They are now in the hallway of the courthouse.

At the request of the accused, which was granted by the undersigned judge, the following question was put to the witness:

Q. Why did you remove with your son-in-law to Sugbong-
20 cogon if, as a matter of fact, you were not compelled by the owner of the hacienda to work there or to leave the same?

A. The reason was because if the accused should see my son-in-law in the hacienda where he was, particularly if he was walking around, he would compel him to work, and in order to avoid this, and because my son-in-law was suffering from pains in his body, we removed to another house without the consent of the owner or of the accused.

By the COURT:

Q. Why do you say that particularly if the accused should see

your son-in-law walking around there he would compel him to work? Do you mean to say that after your son-in-law was beaten, as you claim, he was able to walk about the hacienda?

A. He passed through the hacienda when he came to the court-house in obedience to an order from the court citing him to appear in connection with the injuries which it was claimed had been inflicted upon him by Gabriel Diaz. It was on that occasion that the accused, Gabriel Diaz, saw the deceased; on the afternoon of the same day we both removed to Sugbongcogon.

Testimony of Matias Ferrer, a Witness for the Prosecution, a Native of Capiz, 35 Years of Age, with Certificate of Registration #230,709, Issued by the Bureau of Internal Revenue March 26, 1906.

Having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was questioned as follows:

Q. Do you know of your own knowledge whether Cornelio Alcanzaren died as a result of the injuries inflicted upon him by
21 the accused, Gabriel Diaz, and not as the result of some disease?

A. I know nothing about the subject of the question.

Q. Do you know in what part of the hacienda of Sugbongcogon the house of Fabian Aragon is located?

A. I know the house of Fabian Aragon.

Q. Do you know when the deceased, Cornelio Alcanzaren, removed to that place from the hacienda of San Antonio?

A. I know when he removed to that place.

Q. Do you know whether at the time Cornelio Alcanzaren removed to his new residence he engaged in any work?

A. When he first came there he asked me whether I had some light work for him to do. As I had no light work for him to do, I asked him to fix my fishing net. He worked on it very little and he received no payment in cash because the amount of work done by him was not even sufficient to cover the cost of his food.

Testimony of Tomas A. Ferrer, a Witness for the Prosecution, 31 years of age, with Certificate of Registration #357,786, Issued by the Bureau of Internal Revenue on the 26th of April, 1906.

Having been first duly sworn, testified as follows:

Q. Do you know Gabriel Diaz and Cornelio Alcanzaren?

A. I know the latter but I am not acquainted with the former.

Q. Do you know of your own knowledge that Cornelio Alcanzaren died as a result of the injuries inflicted upon him by Gabriel Diaz?

22 A. I do not.

Q. Do you know when the deceased, Cornelio Alcanzaren, removed to the house of Fabian Aragon from the hacienda of San Antonio?

A. No. I only saw him when he was fixing my brother's net.
Q. Did you see Cornelio engage in any other work after his arrival at the hacienda of Sugbongcogon?
A. I did not.

The other witnesses, Crisanto Bian, Estanislao Francisco and Paulino Salina have not exhibited their certificates of registration, promising to do so tomorrow, alleging that they forgot to bring them with them and left same at home.

The accused, Gabriel Diaz, then asked that the hearing of this case be adjourned until tomorrow, June 30th, at 3 o'clock in the afternoon, in order that he might secure an attorney to represent him and cross-examine the witnesses who have heretofore testified. On account of the lateness of the hour the court adjourned, the hearing to be continued at the time requested by the accused, of which the parties were duly notified, those who could do so signing their names hereon with the judge, to which he certifies.

(Signed) PELAGIO CARBAJOSA.
Justice of the Peace.

(Signed) MATIAS FERRER.
TOMAS A. FERRER.

The accused also subscribes his name to these proceedings,
23 which he attended in person, reserving to himself the right to cross-examine the witnesses tomorrow.

(Signed) GABRIEL DIAZ.

Continuation of Hearing.

In the Justice Court of San Carlos on this 30th day of June, 1906, appeared the complaining witness, Maria Condeno, and the accused, Gabriel Diaz, at about 3 o'clock in the afternoon, for the purpose of hearing the testimony of the witnesses for the prosecution.

CRISANTO PERIANO, a witness for the prosecution, with certificate of registration #357,783, issued this year, having been first duly sworn testified as follows:

Q. Do you know the accused in this case, Gabriel Diaz, and the complaining witness, Maria Condeno?
A. I know the accused, Gabriel Diaz, and Maria Condeno, the complaining witness.
Q. Do you know of your own knowledge whether the deceased, Cornelio Alcanzaren, died as the result of the injuries inflicted upon him by the accused, Gabriel Diaz?
A. I know positively that Cornelio Alcanzaren died as the result of the injuries inflicted upon him by the accused, Gabriel Diaz. The deceased some time before his death told me that he would not die of any other disease or cause except as a result of the injuries which had been inflicted upon him by the accused. He told me this
24 at the laborers' quarters of the hacienda of Sugbongcogon, where he was staying at the time, suffering very much

physically as the result of the punishment inflicted upon him. In view of his critical condition, his mother-in-law and her brother, Fabian Aragon, decided to take him to another house within the said hacienda, that is, to the house of Fabian Aragon, where he died.

Q. Do you know on what day and month he removed to the hacienda of San Jose?

A. I do not. I only know that I saw the deceased, Cornelio Alcanzaren, some time this month.

Q. Did you ever see Cornelia Alcanzaren engaged in any other work in the hacienda or in any other business before his death?

A. I never saw him engaged in any other work in the hacienda or at any other place. He was then suffering from pains near the navel as a result of the injuries inflicted upon him by the accused, Gabriel Diaz.

Q. Did you ever notice whether Cornelia Alcanzaren was suffering from some other disease?

A. I never noticed that he was suffering from any disease at all or that he had any trouble other than that stated before.

Q. Do you know whether the accused was the person actually responsible for the injuries inflicted upon the deceased, Cornelio Alcanzaren?

A. I know very well that the accused, Gabriel Diaz, is re-
25 sponsible for it.

This is all that the witness said and not knowing how to write his name, he signed by mark.

ESTANISLAO FRANCISCO, a witness for the prosecution, with certificate of registration #357,711, for the present year, having been first duly sworn, testified as follows:

Q. Do you know the accused, Gabriel Diaz; and the deceased, Cornelio Alcanzaren?

A. I know the accused, Gabriel Diaz, and the deceased, Cornelio Alcanzaren.

Q. Do you know whether Cornelio Alcanzaren died as a result of the injuries inflicted upon him by Gabriel Diaz, the defendant?

A. I know that the deceased, Cornelio Alcanzaren, died as a result of the injuries inflicted upon him by Gabriel Diaz.

Q. Do you know, that is to say, in what month the deceased, Cornelio Alcanzaren, removed to the house of Juan F. Aragon in the hacienda of San Jose?

A. Yes. I do remember that the deceased, Cornelio, removed to the house of Fabian Aragon but I do not remember the date.

Q. Do you know whether the deceased, Cornelio Alcanzaren, did any work in the hacienda or engage in any other occupation during this month?

A. I have not seen him do any work or engaged in any
26 particular occupation during that time. He was suffering from pains in the neck, in the right side and near the navel, having since died as the result of such pains.

Q. Have you anything further to say?

A. No.

The witness then ratified the whole of his testimony but did not sign the same on account of being unable to write, signing by mark.

The COURT, addressing the defendant, Gabriel Diaz:

Q. Do you wish to cross-examine the witnesses for the prosecution?

A. No sir.

NEMESIO BALCENA, a witness for the prosecution, with certificate of registration #165,293, issued this year, being first duly sworn, testified as follows:

Q. Do you know the defendant, Gabriel Diaz, and the deceased, Cornelio Alcanzaren?

A. I know the defendant, Gabriel Diaz, also the deceased, Cornelio Alcanzaren, very well. The deceased was my brother-in-law.

Q. Do you know whether Cornelio Alcanzaren died as the result of the injuries inflicted upon him by Gabriel Diaz?

A. Yes. Cornelio Alcanzaren died as the result of the injuries inflicted upon him by Gabriel Diaz. The deceased some time before he died said to me, "Manong (brother) I now entrust to you
27 and to brother Fabian my wife, because I see that I am going to die as the result of the injuries I received from Gabriel Diaz."

Q. Did you ever see the deceased, Cornelio Alcanzaren, engage in any particular work or occupation?

A. I never saw him work. On one occasion he called on Matias Ferrer and asked him for work, some light work, and Matias told him that he had nothing but heavy work and pointed out to him a fishing net and asked him if he wanted to work on it.

The witness then ratified the whole of his testimony and signed the same.

The witnesses Fabian Aragon and Paulino Lachica failed to bring with them their certificates of registration, saying that they had left the same with their employer.

At the request of the defendant, Gabriel Diaz, the complaining witness, Maria Condeno, being present, the court ordered that this investigation be adjourned to the 3rd day of July next at ten o'clock a. m.

To all of which I certify.

(Signed) PELAGIO CARBAJOSA.
Justice of the Peace.
GABRIEL DIAZ.
her
MARIA x CONDENO.
mark
NEMESIO BALCENA.
his
CRISANTO x PERIANO.
mark
his
ESTANISLAO x FRANCISCO.
mark

28 *Continuation of the Trial.*

This 3rd day of July, 1906, before me, the Acting Justice of the Peace, personally appeared the witness FABIAN ARAGON, with certificate of registration issued in 1905, the defendant, Gabriel Diaz, and the complaining witness, Maria Condeno, being present, and, after having been first duly sworn, testified as follows:

Q. Do you know Gabriel Diaz, and the deceased, Cornelio Alcanzaren?

A. I know Gabriel Diaz, and the deceased, Cornelio Alcanzaren.

Q. Do you know of your own knowledge whether Alcanzaren died as a result of the injuries inflicted upon him by the defendant, Gabriel Diaz?

A. Yes. The deceased died as a result of the injuries received from the defendant, Gabriel Diaz.

Q. How do you know that Cornelio Alcanzaren died as a result of the injuries inflicted upon him by the defendant, Gabriel Diaz?

A. I know it because I was present when the defendant, Gabriel Diaz, threatened the deceased with bodily injury.

Q. Why do you swear so positively that Cornelio Alcanzaren died as a result of those injuries and not from some disease?

A. I swear that Cornelio died as a result of the injuries
29 because he was not suffering from any disease, and, further, because on one Sunday in the month of June last, I do not remember the date, I went to the house of Matias Ferrer on the beach of the hacienda of San Jose to get the deceased, Cornelio Alcanzaren, who was already suffering from pains in the neck, in the right side of the abdomen and near the navel, and took him to my own house in the same hacienda to render such assistance as I could, and two days later he died as a result of the injuries. He told me before he died that he could no longer resist the pain and that he would probably die before dawn as a result of the beating received from Gabriel Diaz, and then entrusted his wife to me to take care of her after his death. This is what the deceased, Cornelio Alcanzaren, said to me.

Cross-examination by the defendant, GABRIEL DIAZ:

Q. What relationship or kinship existed between you and the deceased, Cornelio Alcanzaren?

A. He was my first cousin.

Q. How far is your house from that of Matias Ferrer referred to in your testimony?

A. More than 600 yards.

Q. Did you see the deceased, Cornelio Alcanzaren, do any work after he was threatened by the defendant, Gabriel Diaz?

A. I did not see him do any work after he was beaten by Gabriel Diaz until his death.

30 The witness then ratified the whole of his testimony and signed with the Justice of the Peace.

PAULINO LACHIA, a witness for the prosecution, with certificate of registration #203601, issued this year, being first duly sworn, in the presence of the parties, testified as follows:

Q. Do you know the defendant, Gabriel Diaz, and the deceased, Cornelio Alcanzaren?

A. I know the defendant, Gabriel Diaz, also the deceased, Alcanzaren.

Q. Do you know whether Cornelio Alcanzaren died as a result of the injuries inflicted upon him by the defendant, Gabriel Diaz?

A. I know that he died as a result of the beating received from Gabriel Diaz.

Q. Why do you say that Alcanzaren died as a result of the injuries inflicted upon him by Gabriel Diaz?

A. I know that his death was brought about as a result of the ill treatment received by him at the hands of Gabriel Diaz for the reason that he was not then suffering from any disease except the beating.

Q. Did you ever see the deceased, Cornelio Alcanzaren, engage in any heavy work?

A. I never saw him do any work at all after he was threatened.

The COURT: Does the accused desire to cross-examine the witness?

The ACCUSED: No sir.

31 The witness then ratified the whole of his testimony, and being unable to write, signed by mark.

Immediately thereafter, all the witnesses for the prosecution having given their testimony, the defendant, Gabriel Diaz, was called upon to present any evidence or witnesses he might desire to introduce in his favor. The accused stated to the court that he had no evidence or witnesses to present but that he himself would make a statement to the court. It being 12 o'clock noon, this investigation was adjourned until 3 p. m., and the parties were duly notified.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.
(Signed) FABIAN ARACAN.
(Signed) GABRIEL DIAZ.

The accused then stated to the court that he would sign his name to the foregoing proceedings after he had secured a copy of the same.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.
(Signed) GABRIEL DIAZ.
his
(Signed) PAULINO LACHICA.
mark.
her
(Signed) MARIA CONDENO.
mark.

32 *Continuation of the Trial.*

This 3rd day of July, 1906, at 3 o'clock p. m., personally appeared the complaining witness and the defendant, and the latter stated to the court that before giving his testimony he would like to be furnished with a copy of all the proceedings heretofore had in this case against him and which were instituted at the request of Cornelio Alcanzaren, such copy to serve him as the basis of his answer to the charge made against him before this court, accusing him of the crime of homicide. He agreed to submit a written petition to the court requesting that he be permitted to examine the record of the former proceedings and that he be furnished with a copy of the same. The court granted the defendant's petition and directed that he be furnished with a copy of the former proceedings had upon the complaint for assault and battery filed against him,—in accordance with his request.

It being late in the afternoon and tomorrow, Wednesday, being an official holiday, this preliminary trial was adjourned to Thursday, the 5th instant, at 10 o'clock a. m., all the parties present signing hereon, to which I, the judge, certify.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.

(Signed) GABRIEL DIAZ.

33 "THE UNITED STATES OF AMERICA,
Philippine Islands:

"To the Justice of the Peace of this Municipality.

SIR: The undersigned, Gabriel Diaz, who now stands charged before this court with the crime of homicide, respectfully states that he desires to carefully examine and commit to memory, if possible, the proceedings in this case, wherefore, he requests Your Honor to grant him permission to examine the former proceedings instituted upon the complaint made by Cornelio Alcanzaren against your petitioner for assault and battery, and your petitioner shall ever pray.

Yours respectfully,
(Signed) GABRIEL DIAZ."

"As a supplementary prayer your petitioner would request that he be furnished with a copy of all the proceedings had in the former trial.

(Signed) GABRIEL DIAZ."

Court of the Justice of the Peace of San Carlos, this 3rd Day of July, 1906.

After reading the foregoing petition presented by Gabriel Diaz, requesting that he be permitted to examine the proceedings instituted in this court against him for assault and battery, and
34 that he be furnished with a copy of the same, it is ordered

that his petition be granted and that he be furnished with a copy of the said proceedings, as requested.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.

NOTE.—A copy of the proceedings was this day furnished the defendant.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.

Continuation of the Trial.

This 5th day of July, 1906, before me, the Justice of the Peace, personally appeared the accused, GABRIEL DIAZ, with registration certificate #356759, issued this year, the complaining witness, Maria Condeno, being present, and stated that with reference to the crime which is the subject of the investigation in these proceedings, he was innocent, not having committed the crime of homicide with which he is charged.

Q. Do you know whether Cornelio Alcanzaren, the son-in-law of the complaining witness, died as a result of the ill treatment received from you?

A. I do not think so. He deserted from the hacienda after this court rendered judgment in the case for assault and battery instituted against me, and I did not see him again until his body
35 was brought into this court as a result of the complaint filed by Maria Condeno.

Q. Do you have anything further to say in connection with this matter?

A. I have nothing to say but simply repeat what I stated in my testimony in the proceedings instituted in this court on the 31st of May last.

Q. Do you have anything to add to or suppress from your statement?

A. I do not.

The witness then ratified the whole contents of his foregoing statement, signing with the judge, to which I certify.

(Signed) PELAGIO CARBAJOSA,
Justice of the Peace.

(Signed) GABRIEL DIAZ.

"To the Municipal Judge of this Town.

SIR: I have the honor to acknowledge the receipt of your communication of today with reference to my report in the case against Gabriel Diaz.

Hacienda of San Antonio, July 6, 1906.

Respectfully,

(Signed) L. G. SUAREZ."

36 Court of the Justice of the Peace of San Carlos, July 6, 1906.

Let the foregoing record be attached to the record to which it belongs.

This 7th day of July, 1906, the physician Luis G. Suarez having failed to appear and submit to this court a certified copy of his report of the post-mortem examination held upon the body of Cornelio Alcanzaren, it is hereby ordered that he be required for the third time to forward the said report as requested in previous communications on the subject and that he be advised that the transmission of these proceedings is being delayed on account of his having failed to submit the said report.

"Court of the Justice of the Peace of San Carlos, July 7th, 1906.

"Dr. Luis Garcia Suarez, San Carlos.

SIR: I have the honor to request for the third time that you please forward to this court the required certificate regarding the result of the post-mortem examination held by you upon the body of the deceased Cornelio Alcanzaren; also that you appear before this court as soon as possible for the purpose of giving your testimony in the proceedings which are now being instituted against Gabriel Diaz
37 for the crime of homicide. I wish to inform you that the transmission of the proceedings to the Prosecuting Attorney of the Province of Occidental Negros has been delayed on account of your failure to submit the said report and give your testimony as aforesaid.

Respectfully,
(Signed) PELAGIO CARBAJOSA.
Justice of the Peace of San Carlos."

NOTE.—This 9th day of July, 1906, the physician Luis G. Suarez was again summoned to appear before this court at 2 o'clock this afternoon, and notified that if he failed to do so he would be dealt with in accordance with the law.

"To the Municipal Judge of San Carlos.

SIR: In reply to your kind communication dated today, relative to the result of the post-mortem examination held upon the body of the deceased Cornelio Alcanzaren, I have the honor to inform you that the examination made by me fails to show any connection between the death of the said party and any bodily injuries received by him. There were, however, strong indications that death was due to a disease of an infectious nature. This is all that I have to state to you as the substance of the post-mortem examination to
38 which you refer.

Respectfully,
(Signed) L. G. SUAREZ."

The United States vs. Gabriel Diaz for Assault and Battery in the Court of the Justice of the Peace of San Carlos this 31st day of May, 1906. The undersigned, Maria Condeno, accuses Gabriel Diaz of the crime of assault and battery committed as follows: In that yesterday about 7 o'clock in the morning the son-in-law of the undersigned, named Cornelio Alcanzaren, was threatened with bodily injury by the accused without any reason therefor except that her son-in-law asked permission from the accused not to work that day, he having gone to confessional the day before, he being about to be married, whereupon the accused became enraged and threatened him with blows with the fist and kicks, inflicting several injuries upon his body, as a result of which he was unable to urinate, his penus having become inflamed, leaving him in a dying condition as a result of the said injuries, all of this in violation of the statute in such cases made and provided.

Yours respectfully,

her
MARIA x CONDENO.
mark.

39 Subscribed and sworn to before me this 31st day of May, 1906.

PELAGIO CARBAJOSA,
Justice of the Peace.

On this same date a warrant was issued for the arrest of the accused, Gabriel Diaz, through the Chief of Police, and it was ordered by the court that Cornelio Alcanzaren, the injured person, be carried in a hammock. Pelagio Carbajosa, Justice of the Peace. This 31st day of May, 1906, personally appeared in court Gabriel Diaz, and was duly informed of the complaint filed against him, appearing at the beginning of these proceedings, and after reading the same he was asked whether he pleaded guilty or not guilty, to which he replied that he pleaded guilty of having slapped Cornelio in the face two or three times for being disrespectful to him. The court thereupon ordered that the defendant be committed unless he gave bail in the sum of Five Hundred Dollars, Philippine currency. Pelagio Carbajosa, Justice of the Peace.—Gabriel Diaz.—Immediately thereafter the Chief of Police was accordingly ordered to take the accused into custody. Carbajosa, Justice of the Peace.—This 31st day of May, 1906, we, Vicente Flores and Pablo Cusio, as sureties for Gabriel Diaz, the defendant in a certain case now pending in this court for assault and battery, hereby, jointly and severally, bind ourselves unto the Government of the United States in the sum of P500.00 and promise to pay the same in case the said Gabriel Diaz should fail to appear whenever required by the court to do so,
40 and In Witness Thereof, we hereunto subscribe our names.—Pablo Cusio.—V. Flores.—May 31, 1906.

NOTE.—According to information received from Sabes Sanchez and Maximo Rayna of the police force, Cornelio Alcanzaren is con-

fined to bed at his house in the barrio of Guadalupe in a critical condition as a result of the ill treatment received by him from Gabriel Diaz according to Alcanzaren himself. The Justice of the Peace immediately went to the place where the said Cornelio Alcanzaren, the son-in-law of the complaining witness, was.—On this 1st day of June, 1906, I the undersigned Justice of the Peace, went to the house of Cornelio Alcanzaren in the hacienda of San Antonio, barrio of Guadalupe, and, finding him in a critical condition, proceeded to take his deposition as to what had occurred to him, and he made the following statement: That on Wednesday, May 30th last, about 7 a. m., deponent was slapped in the face by the accused, Gabriel Diaz, a Spaniard, who also struck him, first, on the right breast, second, in the face, third, on the neck, and kicked him twice near the navel, and that as a result of these injuries he had pains all over his body. The cause of this was that deponent, upon informing the defendant, Gabriel Diaz, that he, deponent, would not report for work on said Wednesday, May 30th, for the reason that he had gone to confessional at the Church of San Carlos the day before, Tuesday, May 29, 1906, was beaten by the latter, who refused to pay any attention to his request and slapped and kicked
41 him, causing him severe physical pains.—Examination of the Body.—From an examination made by me, the undersigned Justice of the Peace, of the injuries received by Cornelio Alcanzaren, it appears (1) that his right thumb was dislocated, (2) that the abdominal region about the navel was swollen and discolored, (3) a scratch on the right breast, (4) a scratch on the neck and (5) a contusion in the face.—The contusions in the abdomen near the navel and those on the breast are apparently serious. The other scratches or abrasions examined by me are all slight; some of them, however, are serious. Deponent, after having been examined by me, said that he did not require any medical assistance but would take care of himself.—Miguel Batacu, a witness for the prosecution, having been first duly sworn, stated that he saw the accused, Gabriel Diaz, threaten Cornelio Alcanzaren with bodily injuries, slaps in the face and kicks, and that apparently the reason for this was that the said Cornelio Alcanzaren failed to inform the accused, Gabriel Diaz, that he, Alcanzaren, was going to stay home that day, and that the witness went after him Wednesday and brought him before the accused, by the latter's order, and upon his arrival Diaz kicked him and struck him in the face.—Juan Lanag, a witness for the prosecution, having been first duly sworn, stated that he saw the accused, Gabriel Diaz, beat Cornelio Alcanzaren, and strike him in the face and kick him in the abdomen near the navel, also on the neck, the witness adding that he did not know the reason why Diaz as-
42 saulted Alcanzaren, but only saw him beat him as aforesaid.—The following witnesses were sworn and examined in the presence of the defendant: Miguel Batacu, a native of Bantayan, Cebu, 26 years of age, married, and a resident of this town, without registration certificate, the same being in the possession of his employer Ramon Lopez. This witness testified that he personally knew Gabriel Diaz and Cornelio Alcanzaren of the hacienda of San An-

tonio; that on Wednesday, the 30th instant, the said Gabriel ordered him to bring before him Cornelio Alcanzaren; that upon his arrival at the sugar mill Diaz struck him three blows in the face and caught him by the collar of his shirt and struck him on the neck with his fist, also on the shoulders, and the witness then went home.—Juan Calanan, 19 years of age, a native of Valladolid of this province, without registration certificate, the same being in the possession of his employer Ramon Lopez, said: That he knows the accused, Gabriel Diaz, also Cornelio Alcanzaren; that he was at the sugar mill of the hacienda of San Antonio, where he saw Gabriel Diaz about 7 o'clock in the morning of the same day slap Cornelio Alcanzaren in the face and afterwards strike him with his fist, being unable to specify on what part of the body he struck him—that he saw nothing more.—The defendant offered to testify in his own behalf and, after having been first duly sworn, said that he merely slapped Alcanzaren in the face several times but that he did not strike him on any other part of the body.—June 2, 1906.—

43 Cornelio Alcanzaren appeared in court, and after a careful examination of his body the court failed to find any contusion of a serious character but only such as might be cured without medical assistance in less than seven days.—Pelagio Carbajosa, Justice of the Peace.—The United States of America, Philippine Islands. Maria Condeno, the complaining witness. Gabriel Diaz, the defendant.—For Assault and Battery.—In the Court of the Justice of the Peace of San Carlos, this 4th day of June, 1906.—Judgment.—This is a prosecution for assault and battery upon the person of Cornelio Alcanzaren, alleged to have been committed by the defendant, Gabriel Diaz. This court, having acquired the necessary jurisdiction to try this case, and having carefully examined all the proceedings therein had, it appears that the defendant is guilty of a misdemeanor, as per his own admission, and he is hereby accordingly sentenced to pay a fine of 50 pesetas, Philippine currency, in accordance with paragraph 1, section 589 of the Penal Code, with the costs of this prosecution. It is so ordered. Pelagio Carbajosa, Justice of the Peace.—The undersigned Justice of the Peace hereby certifies that on this 5th day of June, 1906, the defendant, Gabriel Diaz, paid the fine of 50 pesetas imposed upon him, also the costs of these proceedings, amounting to five dollars, Philippine currency, and that the bond given by him and signed by his sureties, Pablo Cusio and Vicente Flores, was accordingly cancelled, the said fine and costs having been paid into the municipal treasury of this town.

Pelagio Carbajosa, Justice of the Peace.—Immediately there-

44 after there was attached to the record the receipt issued by the municipal treasurer and the record of the case was duly filed in the archives of the court. Carbajosa.—Then follows the receipt, which reads: "Received from Gabriel Diaz the sum of Fifteen Pesos, Philippine currency, the amount of the fine and costs paid by him in the case for assault and battery in which he was found guilty according to the judgment rendered by the court on the 4th instant, which said sum has been paid into the municipal treasury of this town.—San Carlos, June 5, 1906.—Pelagio Carba-

josa, Justice of the Peace." Seal: "Court of the Justice of the Peace of San Carlos, Negros Occidental." Then follows another receipt issued by the municipal treasurer, dated June 5, 1906, regarding the payment of the P15.00 aforesaid.

I hereby certify that the foregoing is a true and correct copy of its original.

(Signed) PELAGIO CARBAJOSA,
[SEAL.] *Justice of the Peace.*

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of the Justice of the Peace of San Carlos, This 9th Day of July, 1906.

The certificate of the physician Luis G. Suarez, a peninsular Spaniard, regarding the result of the post-mortem examination made by him upon the body of Cornelio Alcanzaren, having been received, let the same be attached to the preliminary investigation to which it belongs, also the official copy of the former proceedings in the case for assault and battery now on file in this court, and the court, having carefully examined the said proceedings, also the record of the former case, hereby finds the defendant, Gabriel Diaz, guilty of the crime of homicide, he being the only author and party responsible therefor, and it is ordered that the said proceedings be forwarded to the provincial fiscal of the Province of Occidental Negros for action, the record of the said proceedings consisting of 41 pages, this order to serve as a letter of transmittal of the said documents. So ordered by me, the judge.

(Signed) PELAGIO CARBAJOSA,
[COURT SEAL.] *Justice of the Peace.*

NOTE.—The foregoing order was immediately complied with.

(Signed) PELAGIO CARBAJOSA.
[COURT SEAL.]

Proceedings in the Court of First Instance of Occidental Negros.

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the Province of Occidental Negros, Tenth Judicial District of the Philippine Islands, this Fifth Day of September, Nineteen Hundred and Six.

No. 863.

THE UNITED STATES OF AMERICA
versus
GABRIEL DIAZ.

Homicide.

The undersigned charges Gabriel Diaz with the crime of homicide on the person of Cornelio Alcanzaren, committed within the munic-

ipality of San Carlos, Province of Occidental Negros, Philippine Islands, as follows:

That the said accused, Gabriel Diaz, did on the 30th of May, 1906, assault and beat Cornelio Alcanzaren and that as the result thereof the latter died on the 26th of June last at the hacienda of Sugbongcogon, within the jurisdiction of the said municipality of San Carlos, in violation of the statute in such cases made and provided.

(Signed) MANUEL BLANCO.

Sec. 404 of the P. C.

Witnesses: Matias Ferrer, Tomas A. Ferrer, Crisanto
47 Biarro, Estanislao Francisco, and Paulino Lachica, all living at the Hacienda of Sugbongcogon, municipality of San Carlos.

(Title of Court and Cause Omitted.)

Order.

BACOLOD, *Sept.* 7, 1906.

Let the defendant be informed of the foregoing complaint filed by the Provincial Fiscal, and, it appearing that the said defendant is now at liberty under bail, let an order issue to the Sheriff of this province commanding him to bring the said accused forthwith before this Court.

(Signed) VICENTE JOCSON,
Judge Tenth District.

Notice of the foregoing order was sent to the Provincial Fiscal and an order was issued to the Sheriff of this Province for the immediate appearance of the defendant, this seventh day of September, nineteen hundred and six.

(Signed) M. CUADRA, *Clerk.*

In the Court of First Instance of Negros Occidental the 19th day of September, nineteen hundred and six, in open court, the Honorable Vicente Jocson Tady of the Tenth Judicial District presiding, assisted by me the Clerk, Jose Felix Martinez, Acting Prosecuting Attorney, duly appointed as such by the Court, the regular incumbent being sick, and the defendant Gabriel Diaz, a native of Vega, Oviedo, Spain, single, twenty-five years of age, and a resi-
48 dent agriculturalist of San Carlos of this province, with registration certificate "A" No. 356,759 issued at San Carlos April 17, 1906, accompanied by his attorney, Antonio Jayme, being present, the said defendant was informed of the complaint, which was read in his presence and a copy of same delivered to him, and having been required to state whether he pleaded guilty or not guilty to the crime with which he is charged, his attorney asked that he be allowed twenty-four hours within which to file his answer to

the complaint, which petition was granted by the court. In witness whereof all present signed hereon.

(Signed) VICENTE JOCSON,
Judge Tenth District.
JOSE FELIX MARTINEZ,
Acting Prosecuting Attorney.
GABRIEL DIAZ, *Defendant.*
ANTONIO JAYME,
Attorney for Defendant.
MARIANO CUADRA,
Clerk of the Court of First Instance of Occidental Negros.

(Title of Court and Cause Omitted.)

Plea of Jeopardy Against the Complaint for Homicide.

Counsel for defendant in the above entitled cause invokes in his favor the provisions of Section 26 of General Order 58 relating to double jeopardy based on the legal maxim "non bis idem."

Gabriel Diaz is accused of having beaten Cornelio Alcanzaren, who died 28 days later as a result of said beating and for which he was prosecuted, tried and convicted in the Court of the Justice
49 of the Peace of San Carlos of this province, the judgment rendered by the Justice of the Peace having been duly executed.

The defendant having been already tried and convicted upon a complaint filed by the Provincial Fiscal in the Court of the Justice of the Peace, such conviction, under section 28 of said general order, is a bar to a further prosecution for the same crime.

Therefore, in view of the judgment rendered by the Justice of the Peace of San Carlos and the execution of the same, both appearing at the end of the preliminary investigation which counsel for Gabriel Diaz now adduces as prima facie evidence in these proceedings,

We pray that, Gabriel Diaz having been once in jeopardy on account of a previous prosecution, wherein he was convicted, this court declare that he cannot be again tried for the same offence charged in the former complaint, nor for any other crime necessarily included therein and that the present plea of double jeopardy be accordingly sustained.

Bacolod, Sept. 21, 1906.

(Signed) ANTONIO JAYME,
Attorney for Defendant.

Received Copy:
(Signed) JOSE FELIX MARTINEZ,
Acting Prosecuting Attorney.

In the Court of First Instance of Occidental Negros this 26th day of September, 1906, in open court, the Honorable
50 Vicente Jocson, Judge of the Tenth District, presiding, assisted by me the Clerk, the provincial fiscal, the defendant Gabriel Diaz, accompanied by his attorney Antonio Jayme, being

present, the demurrer to the complaint heretofore filed was duly argued and after hearing both parties the court made the order which follows overruling the said dilatory plea and directing that defendant plead to the complaint, whereupon he was arraigned, and having pleaded not guilty, the court ordered that the parties proceed to trial. The Provincial Fiscal offered in evidence in support of his complaint the testimony of the witnesses whose names appear at the bottom of the complaint; counsel for defendant did not offer to introduce any particular evidence but promised to introduce whatever evidence he might have on the day of the trial. The court then declared that the evidence sought to be introduced by the prosecution was relevant and at the request of the parties the trial was continued to the next term of court.

(Signed) M. CUADRA, *Clerk.*

(Title of Court and Cause Omitted.)

Decision.

Counsel for defendant alleges in his motion that he has been twice put in jeopardy of punishment for the same acts by reason of the present prosecution and sets this up as a plea in bar.

51 Jeopardy cannot be pleaded as the ground of a demurrer to the complaint for the reason that the same is not one of those enumerated as such in section 21 of General Order 58. It might be pleaded at most as a defence on the merits, the facts upon which the defendant bases his plea not appearing from the complaint itself, and must therefore be the subject of proof.

However, it is evident from defendant's own allegations that the accused was actually convicted in the Justice Court of a simple misdemeanor, assault and battery, but he now stands charged before this court with the grave offence of manslaughter.

It is not necessary for the court to explain the difference which exists between a simple misdemeanor and manslaughter. The prosecuting attorney as well as counsel for the defence are fully aware of the legal nature and definition of both.

The court quite agrees with defendant's theory on the subject of double jeopardy but fails to see how the principle can be applied to the facts in this case. Counsel's arguments and conclusions assume a state of facts which does not exist here.

One of the essential requisites to the plea of double jeopardy is that the former trial was had before a competent court. Such is not the case here. A justice of the peace has no power to try persons for homicide, but for misdemeanors only. If it were lawful for a justice of the peace to try persons charged with homicide, then abuses and arbitrariness on their part would be a matter of every-day occurrence and criminals in many cases would go unpunished.

52 In the rural towns collusion in cases where the defendant is a man of means would be, in my opinion, a very probable thing.

The defence of *res judicata* involved in the plea of double jeopardy,

in order to be available as such and to exempt the defendant from criminal liability, requires (1) that the Judge who first tried the defendant had jurisdiction to try him for the offence with which he was charged, and (2) that the acts for which he was tried be of the same nature as those which are the subject of the second prosecution. In this case there is no parity either in the jurisdiction of the two courts or in the nature of the two offences. A justice of the peace has no power to try persons for homicide and the facts alleged in the complaint do not constitute a misdemeanor such as that which was the subject of the decision of the justice of the peace in the former prosecution.

Section 27 of General Order 58 provides that an acquittal shall not be a bar to a second prosecution where the evidence, while at variance with the facts set out in the complaint, still justifies a second prosecution against the accused.

Therefore, the theory of double jeopardy cannot be successfully invoked at this stage of the proceedings, nor can the defence of *res judicata* be so invoked for the reason that the prosecution in the Justice Court was for a misdemeanor, whereas the complaint in this case charges defendant with a serious crime.

For the foregoing reasons the motion is overruled and it is ordered that defendant plead to the complaint.

53 It is so ordered.

(Signed) VICENTE JOCSON.
Judge, Tenth Judicial District.

NOTE.—Antonio Jayme, counsel for defendant, excepted to the foregoing order.

(Signed) M. CUADRA, *Clerk.*

On November 26th, 1906, subpœnas were duly issued commanding Tomas Ferrer, Crisanto Biarro, Estanislao Francisco, Gabriel Diaz, and Matias Ferrer to be and appear at the Court of First Instance for the Province of Negros Occidental on the 17th day of December, 1906, at 8 a. m., then and there to testify in this case against Gabriel Diaz.

According to the sheriff's return on the back of the subpœna, dated December 5, 1906, the above witnesses were not served with same, they being absent in the Island of Panay.

In the Court of First Instance, Negros Occidental, this 17th day of December, 1906, in open court, the Honorable Vicente Jocson of the Tenth District presiding, the Fiscal, the defendant, Gabriel Diaz, and his attorney, being present, the latter moved the court to
54 dismiss the case on the ground that the witnesses for the prosecution had failed to appear. The Fiscal objected, stating that the witnesses had not even been notified of the subpœna, they being absent in the Island of Panay looking for laborers for some of the sugar plantations of the municipality of San Carlos. The Court overruled said motion to dismiss and continued the trial of the

case to the month of January, 1907, when the day on which same must take place was to be definitely fixed.

(Signed) VICENTE JOCSON, *Judge.*

(Signed) MANUEL BLANCO,
Provincial Fiscal.

(Signed) ANTONIO JAYME,
Att'y for Defendant.

(Signed) GABRIEL DIAZ.

(Signed) MARIANO CUADRA, *Clerk.*

In the Court of First Instance of Negros Occidental this 23rd day of January, 1907, in open court, the Honorable Vicente Jocson, Judge of the Tenth District, presiding, the Provincial Fiscal, the accused, Gabriel Diaz, and his attorney, Antonio Jayme, being present, the latter asked the court to issue an order for the arrest of the witnesses for the prosecution who had failed to appear. The Fiscal objected on the ground that the witnesses had not been served with copy of the subpœna commanding them to appear for the reason
55 that they were then temporarily absent in the Province of Iloilo in search of laborers and suggested that the Administrator of the plantation, Jose Luis Pijuan, be requested to notify the Municipal President of San Carlos as soon as the said witnesses return to the said plantation so that the said president may cause the said witnesses and the defendant to appear in this court. The Court granted the Fiscal's request and instructed the sheriff accordingly.

(Signed) M. CUADRA.

(Title of Court and Cause Omitted.)

Counsel for defendant Gabriel Diaz in the above entitled case asks the court to continue the trial of same to the 15th of August next for the reason that his witnesses will not be able to appear in court on the day following the election of members to the Assembly, to be held at San Carlos the 30th instant, considering the distance between said town and this city.

Bacolod, July 19, 1907.

(Signed) ANTONIO JAYME,
Attorney for Defendant.

NOTE.—Trial continued to the 15th of August.

In the Court of First Instance of Occidental Negros, the 15th day of August, 1907, in open court, the Honorable Vicente Jocson
56 of the Tenth District presiding, the Provincial Fiscal, the accused, Gabriel Diaz, and his attorney being present, this case was called for trial. Matias Ferrer and Tomas Ferrer having testified as witnesses for the prosecution. At the request of the Provincial Fiscal the hearing was suspended and an order was issued for the arrest of the witnesses Crisanto Biarro, Estanislao Francisco and

Paulino Lachica, directed to the Senior Inspector of the Constabulary of this province.

(Signed) M. CUADRA, *Clerk*.

In the Court of First Instance of Occidental Negros, this 29th day of August, 1907, in open court, the Honorable Vicente Jocson of the Tenth District presiding, the Provincial Fiscal and the accused, Gabriel Diaz, accompanied by his attorney, being present, the trial of this case was resumed and the witnesses for the Government Santos Priano and Estanislao Francisco were examined.

The Fiscal asked the Court to subpœna the Justice of the Peace Pelagio Carbajosa and the clerk who reduced to writing the testimony of Santos Priano and Estanislao Francisco and also asked that Fabian Aragan be subpœnaed as a witness.

An order was thereafter sent by the sheriff by wire to the deputy sheriff at San Carlos directing him to subpœna the said witnesses.

(Signed) M. CUADRA, *Clerk*.

57 In the Court of First Instance of Occidental Negros, this 20th day of September, 1907, in open court, the Honorable Vicente Jocson of the Tenth District presiding, the Provincial Fiscal and counsel for defendant being present, the accused himself having waived his right to be present at the trial according to a telegram just received from him, the trial of this case was resumed and Pelagio Carbajosa, a witness for the prosecution, was examined. The prosecution then rested and counsel for defendant only introduced in evidence certified copy of the proceedings in the case for a misdemeanor instituted in the Court of the Justice of the Peace of San Carlos against the defendant Gabriel Diaz which said copy is attached to the record of this case at pages 36 to 40.

The trial was then adjourned for the purpose of allowing the Fiscal to introduce evidence in rebuttal.

(Signed) M. CUADRA, *Clerk*.

Telegram received.

SAN CARLOS, Sept. 20/07.

Judge Jocson, Bacolod:

I waive right to be present during the examination of government witnesses.

GABRIEL DIAZ.

58 In the Court of First Instance of Occidental Negros, this 21st day of September, 1907, in open court, the Honorable Vicente Jocson of the Tenth District presiding, and the Provincial Fiscal and counsel for the defendant being present, the trial of this case was resumed and Jose Hidalgo, a witness for the prosecution, was examined in rebuttal. The Fiscal then rested his case and counsel for the accused waived his right to introduce further evidence.

Both parties having rested, the Fiscal and counsel for defendant respectively made their oral argument, and the Court declared the trial closed and took the case under advisement.

59 *Testimony.*

THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of Occidental Negros, Tenth Judicial District.

Criminal Case #449.

THE UNITED STATES
versus
GABRIEL DIAZ.

For Homicide.

BACOLOD, Aug. 15/1907.—a. m.

Before the Honorable Vicente Jocson Tady, the same parties being present, the trial of this case was resumed commencing with the evidence for the prosecution.

MATIAS FERRER, 36 years of age, married, laborer, and a resident of San Carlos, being first duly sworn, testified as follows:

By the FISCAL:

Q. Where were you on May 30th, 1906?
A. At the Hacienda Sugbongcogon.
Q. What was your occupation there at that time?
A. I had a contract with the owner of the farm for cutting and transporting sugar cane within the hacienda.
Q. Did you know Cornelio Alcanzaren?
A. Yes sir.
Q. How did you come to know him?
A. One day he came to me looking for work.
60 Q. Where is he now?
A. He is dead.
Q. When did he die and of what?
A. I think he died in June, 1906.
Q. Do you know what was the cause of his death?
A. I do not know but somebody told me that he died as a result of the ill treatment received by him at the Hacienda where he lived, known as Sugbongcogon.
Q. Who was in charge of that Hacienda in May, 1906?
A. Abelardo Colmenares.
Q. Was there any other person there besides Colmenares?
A. No sir, he was the only one there.
Q. Do you know what Hacienda he came from?
A. From the Hacienda of Ramon Lopez.
Q. Do you know who ill treated Cornelio?
A. I do not.

Q. Do you know Gabriel Diaz.
A. Yes
Q. Where was he employed in May, 1906?
A. In the Hacienda of Ramon Lopez.
Q. Do you remember when Cornelio Alcanzaren first came to the Hacienda Sugbongcogon?
A. I do not remember the date as that happened long ago.
Q. What month was it?
A. June.

61 Q. Was in at the beginning, in the middle or toward the end of the month that he came to you?
A. Before the month was up.

Q. But was it long before the month was up?
A. No sir.
Q. Was it about the 20th of June that he came to you?
A. I cannot say positively; I do not remember exactly the date.
Q. Was it the 25th?
A. I cannot say.
Q. When Cornelio came to you before the month was up and asked you for work, what was the condition of his health?
A. Apparently he was in good health. This belief is strengthened by the fact that he was looking for work.
Q. What kind of work did he ask for?
A. I asked him to fix my fishing net for me.
Q. How many days did he work for you?
A. I think it was three days.
Q. Where did he go after that?
A. He was taken sick.
Q With what?
A. I do not know.
Q. How many days was he sick before he died?
A. He was sick for about a week before he died.

FISCAL: That's all.

Cross-examination by COUNSEL FOR DEFENDANT:

62 Q. During the time Alcanzaren was occupied in mending the fishing net, did he engage in any other work?
A. As he usually left the house immediately after working hours, I cannot say.

Q. Is the plantation where you work near to or distant from the beach?
A. It is not very distant; I guess it must be some 400 yards from the plantation to the beach.
Q. Do you know whether during that time Alcanzaren ever went to the beach or to some place near the beach?
A. I do not remember.

Q. That's all.

TOMAS FERRER, 33 years of age, married, a laborer, and a resident of San Carlos, being first duly sworn, testified as follows:

By the FISCAL:

Q. Do you know the defendant Gabriel Diaz?
A. Yes sir, I know him.
Q. Where were you on the 26th of June, 1906?
A. At the Hacienda of Sugbongcogon.
Q. What were you doing there?
A. I was foreman in charge of the gondola cars.
Q. Did you know Cornelio Alcanzaren?
A. Yes.
Q. How?
A. Because he lived right there with us and worked in the same Hacienda fixing the fishing net.
Q. How long did Cornelio stay at the Hacienda of Sugbongcogon?
63 A. I do not know exactly but I think he remained there scarcely a month.
Q. Where is he now?
A. He is dead.
Q. When did he died?
A. I do not remember.
Q. Where did he die, at the Hacienda Sugbongcogon?
A. Yes.
Q. What did he died of?
A. I do not know.
Q. Where you present when Cornelio arrived at the Hacienda Sugbongcogon looking for work?
A. I did not see him when he arrived there; when I first saw him he was already working repairing the fishing net.
Q. What was the condition of his health when you saw him; was he well?
A. I do not know whether he was sick or not.
Q. When he arrived at the plantation, where did he come from?
A. I do not know.

Q. That's all.

No cross-examination.

The COURT: Next witness.
The FISCAL: There are other witnesses but it appears that they have failed to come. I ask that an order be issued for their arrest.
64 The COURT: In conformity with the Fiscal's request let an order issue for the arrest of the witnesses.

Court adjourned.

AUGUST 29, 1907, — a. m.

Present: The same parties.

Continuation of evidence for prosecution:

SANTOS PRIANO, 29 years of age, single, laborer, and a resident of Iloilo, being first duly sworn, testified as follows:

Q. Did you know Cornelio Alcanzaren?
A. Yes sir, because I saw him on the beach at the house of Matias Ferrer with whom he lived.
Q. Where was he working then?
A. I do not know. I simply know that he was living with Matias Ferrer.
Q. Where is Cornelio now?
A. He is dead.
Q. How long ago did he die?
A. I do not know.
Q. How do you know that he died?
A. Because I helped to bury him.
Q. How long ago did you bury him?
A. I do not remember.
Q. What did he died of?
A. I do not know.
Q. Where did he die?
A. On the bank of a river the name of which I do not know, but it runs between Dapdap and Sibuncogon, at his cousin's house.
Q. In what hacienda is the house where he died located?
A. In the Hacienda Subungcogon.
Q. When Cornelio died who were working at the Hacienda Subungcogon?
A. Formerly Sierra and his clerks, Don Valentine and Colmenares, were in charge.
Q. Do you know Gabriel Diaz?
A. Yes sir, I know him because once he used to live at Dapdap and frequently passed through Sibungcogon.
Q. Do you know whether there was any quarrel or fight between Gabriel Diaz and the deceased Alcanzaren?
A. I do not.
Q. Did you testify before the Justice of the Peace?
A. Yes.
Q. Do you remember what you said there?
A. No sir.
Q. When you testified before the Justice of the Peace, did you do so under oath?
A. No sir.
Q. I will now read the testimony given by you in the Court of the Justice of the Peace and will ask you to state whether or not it is correct?

65

A. As to the first question, what I said then is true (p. 23).
66 As to the second, it is true I said Cornelio Alcanzaren had stated to me that if he died at all it would be as a result of the blows received by him. But he said this to me before he was taken sick, four weeks before he died. The rest of my answer to the question is all true. As to the third question, I simply said that I did not know the day he was removed to the Hacienda San Jose. As to the fourth question, it is true I testified as it says there; but I was simply repeating what Cornelio said to me because I did not know what disease he was suffering from. With reference to the fifth question, everything stated by me in answer thereto is true. As to the sixth question, it is true that I testified as it says there but I was simply repeating what Fabian's cousin said to me. I did not see that myself.

Q. How long was Cornelio sick?

A. I do not know.

Q. Then why did you say that deceased died four weeks after his conversation with you in which he said that if he died at all it would be as a result of the ill treatment received at the hands of the accused?

A. All I remember is the time that elapsed between our conversation and his death.

Q. Did you see Cornelio sick in bed?

A. No sir.

Q. How long was he confined at the Cuartel?

A. Four weeks.

Q. During those four weeks you did not enter the laborers' quarters, did you?

67 A. No sir.

Q. Then how do you know that Cornelio stayed at the cuartel during those four weeks?

A. Because I met him a few times on the road at night walking.

Q. And what did he do at the hacienda during those four weeks?

A. I cannot say as to that because I never saw him at the Hacienda.

Q. But have you not said just now that Cornelio stayed at the cuartel for four weeks?

A. I live at some distance from the cuartel where Cornelio Alcanzaren was at the time, that is to say, the cuartel of Matias Ferrer on the beach. My cuartel is between Ferrer's and that of the Hacienda Sibungcogon.

Q. What was the condition of his health when you saw him in the evenings walking along the road?

A. I do not know that he was sick at all. He walked as though nothing was the matter with him.

Q. Who ordered you to help bury Cornelio?

A. Matias Ferrer, because I also worked for him.

Q. You mean to say that Ferrer has separate quarters for his laborers?

A. No sir. He has a single building for bachelors; and we married men occupy separate private houses.

Q. At what time was he buried?

A. About ten in the morning.

68 Q. Did you go to the municipal government building to register his death?

A. Yes sir, we who conveyed the body stopped to rest at a house near the municipal building and the deceased's cousin made the report.

Q. Who helped you to convey the body?

A. Capstani, Estanislao Francisco, Paulino Lachica, a relative of the deceased whose name I do not know, and myself.

Q. Was there anybody else with you?

A. Yes sir, Fabian, a cousin of the deceased.

Q. When you took the body of the deceased out of the cuartel, were the persons in charge of the hacienda, Valentine and Colmenares, present?

A. No sir.

Q. That's all.

Cross-examination by COUNSEL FOR DEFENDANT:

Q. During the time Alcanzaren was at the Hacienda Sibungcogon, and with the exception of those evening walks you spoke about, did you ever see him take part in any amusements or anything else?

A. I did not; perhaps in the daytime.

Q. Do you remember how many times you saw him walking and talked to him?

A. I do not remember.

Q. That's all.

69 ESTANISLAO FRANCISCO, 20 years of age, laborer, being first duly sworn, testified as follows:

By the FISCAL:

Q. Do you know Gabriel Diaz and Cornelio Alcanzaren?

A. Yes, sir.

Q. Why do you know them?

A. I know Diaz because I often see him go to the plantation San Jose, where he is employed, and Alcanzaren because he used to go to the beach for a walk and call at the house of Matias Ferrer.

Q. Where do you work?

A. In Sibungcogon.

Q. And where is Ferrer's house?

A. Towards the beach of the Hacienda Sibungcogon.

Q. And Cornelio Alcanzaren, where did he work?

A. I do not know.

Q. Where is he now?

A. I do not know.

Q. Where were you living in May, 1906?

A. In Iloilo.

Q. Where were you in June, 1906?

A. In Iloilo.

Q. Were you in Iloilo during the whole of the year 1906?
A. Yes, sir.
Q. In what year did you work at the Hacienda Sibungcogon?
A. I do not remember.
Q. How long is it since you stopped working at the Hacienda Sibungcogon?
70 A. About two years ago.
Q. Did you testify as a witness in the Justice Court of San Carlos?
A. Yes, sir.
Q. In what month and year?
A. I do not remember now.
Q. Do you remember whether you testified under oath?
A. I do not remember.
Q. Who was the Justice of the Peace before whom you testified?
A. I do not know.
Q. Who was present when you testified in the Justice Court?
A. I do not remember.
Q. Do you remember what you testified to there or the matter upon which you testified?
A. I do not remember.
Q. Do you remember what you said there?
A. I do not.
Q. If I read to you the testimony given by you in the Justice Court, would you remember what you said then?
A. I will hear it read first.

Q. The witness' testimony is read to him.

A. I simply confirm and ratify everything I have said with reference to the first question. As to the remaining questions, I did not testify what it says there.

Q. That's all.
No cross-examination.

71 The FISCAL: I ask that the hearing be continued for the reason that I must bring here the Justice of the Peace and the man who reduced this testimony to writing in order to contradict the statements made by these two witnesses, and I also ask that a subpœna issue for the appearance of Fabian Aragan.

Hearing continued.

SEPTEMBER 20, 1907, — a. m.

Trial resumed.
Present: The same parties except the accused.

PELAGIO CARBAJOSA, 27 years of age, married, an agriculturist and resident of Calatrava, San Carlos, being first duly sworn, testified as follows:

By the FISCAL:

Q. In June, 1906, did you hold any official position in the municipality of San Carlos?

A. Yes sir, Justice of the Peace.

Q. Do you remember whether as such Justice of the Peace of San Carlos you held a preliminary investigation in a case for homicide against Gabriel Diaz?

A. Yes sir, I do.

Q. Do you remember the names of those who testified as witnesses in the course of that preliminary investigation?

A. I do not remember the names.

Q. Do you know whether Estanislao Francisco and Crisanto Priano testified as witnesses for the prosecution in that in-

72 vestigation?

A. Yes sir, I do.

Q. I will now show you the testimony appearing at pages 22 and 23 of the record of the preliminary investigation and will ask you to state whether or not the same was taken before you?

A. Yes sir, that is the testimony of Estanislao Francisco and Crisanto Priano.

Q. The statements contained in their testimony as it appears from the record are the same and the only statements made by the witnesses before you?

A. Yes sir.

Q. Did the witnesses testify under oath?

A. Yes sir.

Q. Were these statements made by the witnesses voluntarily in answer to questions put by you or by counsel for defendant?

A. Yes sir, they testified voluntarily as stated there.

Q. Was the accused, Gabriel Diaz, present when those witnesses testified?

A. Yes sir, both the accused and the complaining witness.

Q. Who was the clerk who reduced their testimony to writing?

A. A fellow by the name of —— —— wrote part of it.

Q. You mean the testimony of Estanislao Francisco and Crisanto Priano?

A. Yes, his name is Pablo Cusio.

73 Q. That's all.

Cross-examination by COUNSEL FOR DEFENDANT:

Q. How were the witnesses sworn in?

A. I made them raise the hand and swear in the manner prescribed by law that they would tell the truth.

Q. Were they sworn in Spanish or in the Visayan dialect?

A. In both.

Q. Do you remember having tried the accused on a complaint for a misdemeanor, based upon the same facts which were the subject of this preliminary investigation?

A. I do.

Q. What was the judgment rendered?

A. I sentenced him to pay a fine.

Q. Did he pay the fine?

A. Yes sir, and the money was paid into the municipal treasury.

Q. Why did you try him for assault and battery?

A. Because the deceased Cornelio Alcanzaren in his life-time came to me as Justice of the Peace and told me that he had been assaulted by Gabriel Diaz and I had to take cognizance of the matter. The defendant pleaded guilty and was accordingly convicted.

Q. My question is—why did you try him for a misdemeanor?

The COURT: The witness has already answered the question.

A. And for that reason I fined him for a misdemeanor.

Q. Do you remember whether or not before you decided the case for assault and battery you asked the complaining witness
74 if he wanted to be treated by a physician and he said no, do you remember that?

A. No, I do not.

Q. Do you remember whether the injured party was treated by a physician?

A. I do not remember whether he was treated by a physician or not.

Q. Did not his injuries, in your opinion, require medical treatment?

A. No, because his mother-in-law said she would take care of him.

Q. Look at this signature and state whose it is and who made this examination?

A. This examination was made after the man's death, when the post-mortem examination was made.

Q. I only want to know——

A. Yes, I know, that is the signature of Dr. Suarez who examined the body of the deceased.

Q. This then is the doctor's certificate, is it not?

A. Yes.

Q. That's all.

By the COURT:

Q. You mean to say that in the case for a misdemeanor tried before you, the accused when he pleaded guilty admitted at the same time that he was responsible for the injuries inflicted upon Cornelio Alcanzaren?

A. Yes sir, I remember that the accused admitted that
75 he had inflicted the injuries upon Cornelio Alcanzaren.

Q. After you decided the case against Diaz, how many days elapsed before Cornelio died?

A. If I remember correctly, some twenty days.

Q. Did you see the injuries?

A. Yes sir.

Q. On what part of the body were they?

A. Some on the neck, others on the navel, that's all.

Q. What was the nature and extent of the injuries on the neck?

A. They were slight.

Q. The shape?

A. There was no abrasion or wound but merely swelling of the muscle.

Q. And what was the shape of the contusions on the navel?
A. They were also swollen.
Q. Can you state approximately what was the extent of the swelling on the navel?
A. The inflammation of the navel was about eight centimeters in length and had a rectangular shape.
Q. Did you notice whether the inflammation was red or kind of discolored?
A. It was rather discolored.
Q. Was the inflammation very prominent, protruding?
A. Yes sir, it was very prominent.
Q. Did you feel the swollen part of the navel with your fingers?
76 A. I simply looked at it, I did not feel it.
Q. What was Alcanzaren's complexion?
A. Brown.
Q. Did the accused explain how he struck Alcanzaren on the neck?
A. No, he only admitted having beaten him in the face.
Q. With what instrument did he beat him?
A. With the open hand.
Q. Was the contusion on the navel caused with the open hand too?
A. According to the deceased it was caused by a kick which the accused gave him.
Q. Did the deceased state whether Diaz wore shoes when he kicked him?
A. He said nothing about that.
Q. And Gabriel Diaz, what did he say, with what instrument did he strike Alcanzaren on the navel?
A. There was no weapon used.
Q. (Question repeated to witness.)
A. He denied having struck him in the navel and simply admitted that he slapped him in the face.
Q. Then you made no inquiry as to who had struck Cornelio in the navel?
A. Do you mean in the first investigation made by me?
Q. Yes, in the case tried before you.
A. I made an investigation, the result of which showed that Gabriel Diaz was the party who inflicted the contusions on
77 the navel.

Q. That's all.

Cross-examination by COUNSEL FOR DEFENDANT:

Q. In the case for a misdemeanor tried by you, did Gabriel Diaz testify as a witness in his own behalf?
A. Yes sir, he testified in his own behalf.
Q. State the reason why you considered as a misdemeanor the act committed by the accused and reported to you by the complaining witness?
A. Because the injuries were apparently slight. Consequently I

made the required investigation and tried and convicted him accordingly.

Q. In your opinion, how long would it have taken the injured party to recover from the effects of the blows?

A. I cannot say, not being an expert on the subject.

Q. That's all.

By the FISCAL:

Q. How tall was the deceased?

A. Almost as tall as the accused.

By the COURT:

Q. Why then did you try him for a misdemeanor if you were unable to determine how long it would take the injured party to recover from the effect of the blows?

A. Because the deceased himself said that the injuries were slight and required no medical treatment.

Q. Then you, as a Justice of the Peace, in a criminal case,
78 simply go by what the injured party or other interested parties may say with reference to the time required for the wounds to heal?

A. Well, your honor, I really——

Q. Is it not your duty to do everything in your power and to employ every possible means to ascertain the true nature and extent of the injuries?

A. Your honor, I saw that the injuries were slight and therefore tried the case.

Q. Did you not know that the contusion in the navel might be more or less serious considering the tenderness of that part of the human body?

A. I did not know that.

Q. That's all.

The FISCAL: The prosecution now rests.

COUNSEL FOR THE DEFENDANT: I now offer in evidence the record of the proceedings in the case for a misdemeanor, which is the only proof, and that's all.

At the request of the prosecution and for the purpose of introducing evidence in rebuttal, the hearing of this case is adjourned sine die.

SEPTEMBER 21, 1907, — a. m.

Present: The same parties.

Government's evidence in rebuttal:

JOSE HILADO, of age, a physician and resident of this city,
79 being first duly sworn, testified as follows:

By the PROSECUTION:

Q. How long have you practiced medicine?

A. I have practiced medicine at intervals but continuously only since 1902.

Q. Can you tell us whether a blow in the navel of a person would affect or injure any interior organ of the body, and if so, which?

A. Dealt with what sort of an instrument?

The COURT: With a hard instrument.

A. Of what size?

The FISCAL: Of eight centimeters square.

A. If the blow is dealt on the navel itself it may affect the intestines; if a little above the navel, the stomach; and if below the navel, the bladder, provided the same is charged with urine.

Q. And such a blow, affecting any of those organs, what general effect would it have upon the person of the party injured?

A. The effect would be in proportion to the intensity of the blow.

Q. A person is mauled and beaten by another and apparently received a blow in the stomach, I mean in the navel or near it, with the heel of a shoe or with some other hard instrument, and as a result of the injury that part becomes inflamed, what effect would such injury have upon the individual?

The COURT: That is to say, would it affect any of the in-
80 ternal organs?

A. It may, if it has caused a swelling of the skin it might.

Q. And how would the fact that some of the organs have been injured affect the individual?

A. A person thus injured might easily recover if properly treated, if the injury extends to the abdominal region only, particularly if death does not immediately follow the blow.

Q. And assuming that the patient does not receive the proper or necessary treatment, the nature of the injury considered, do you think that death would be a necessary consequence?

A. Not necessarily, no; the party may recover without treatment but he may die too; death would not follow as a matter of necessity but the party may possibly die.

Q. At what time would the person die, if at all?

A. If death does not follow immediately after the blow it would not occur at all unless the intestines, the stomach or some other organ affected by the blow, and particularly the peritoneum, should become inflamed. This inflammation, if it existed at all, could not have been overlooked by the persons who attended the patient.

Q. My question is whether in case any of those organs should have been affected by the blow death would have occurred and when, if at all?

A. The inflammation might have or rather should have occurred a few days later and disappeared in the course of a week
81 or two.

Q. Could a person thus injured live more than two weeks after the blow?

A. If the patient was to recover at all, yes, he would, provided the complication which would follow gradually improved; otherwise he will die; he would hardly live two weeks.

Q. Do you think that such a person would live twenty-six days and then die?

A. I think twenty-six days would be too long; perhaps he may but I think it would be too long.

Q. And do you think that after the complication or inflammation of any of those organs had occurred, the person would be able to work?

A. No sir.

Q. That's all.

A. The post-mortem examination disclosed no injury of the internal organs to which I have referred.

Q. Could the complication to which you have referred be detected on a post-mortem examination made two days after death?

A. I think a day after it might.

The COURT: And two days later?

A. It would be very difficult because the aspect of the tissues changes greatly.

Q. What effect would a blow on the neck with a hard instrument have on the person of the party receiving same?

A. If in the center of the neck it may cause the rupture of the trachea, an ecchymosis, and the result would be instantaneous death by asphyxia unless something was done right away
82 to prevent it; if on the side of the neck, it would have no serious consequence; and if on the back of the neck, it may cause immediate death.

The COURT: So that a contusion such as the one described by you, assuming the same to be on the navel or near it, the inflammation covering a space of eight centimeters and the skin being greatly discolored, do you think that judging from these inward, I mean outward signs, that the internal organs could have been injured?

A. It may be, but it should be borne in mind that, according to the questions propounded by the Fiscal, death occurred twenty-six days later and that the party was able to work during that time. I think that under such circumstances it could not be.

The COURT: The question asked you is whether he could work.

A. And my answer to that is no. If he worked during the 26 days I cannot say that he died as a result of the blows.

Q. Supposing that he did not work during the 26 days preceding his death, could same be attributed to the blows?

A. It may be possible, although as I have already said twenty-six days was an unreasonable time and it is not likely that death should have occurred as a result of the blows.

Q. If the person was in good health before the blow was struck, do you think that nature alone could have delayed the more or less lamentable outcome of the complication caused by the injury?

83 A. It may be but I think that the time was too long.

Q. So then the average period fixed by you as that within which a person might die as the result of such a blow is not absolutely certain?

A. No sir.

Q. Then the party might have died two weeks or a month later?

A. Yes.

Q. You mean to say that according to medical science it is impos-

sible to say in such cases with absolutely certainty within what period of time the party may either recover or die?

A. No, because the course of the sickness varies considerably. Typhoid fever, for instance, ordinarily takes two weeks but it may require two months.

Q. Then the outcome of the sickness, the period within which the patient should recover or die, depends not only on the circumstances surrounding the case but also on the physical strength of the patient.

A. Yes sir, the physical condition of the person has a great deal to do with it.

Q. A laborer, ordinarily engaged in hard farm work, has, as a rule, a greater physical resistance than a man who habitually works in a law office, has he not?

A. In certain kinds of disease, yes. But in the event of an inflammation, as it would have been the case here, too much vitality often causes infection. In certain kinds of disease, excessive vigor is not a good thing.

84 Q. But a laborer, being physically stronger, can hold out longer than a man who leads a sedentary life, can't he?

A. It all depends on the nature of the injury; that would not be true in this case.

Q. Are you sure that it would make no difference?

A. I am sure it would not.

Q. Then you mean to say that the weaker the person the longer he would live in a case like the one under consideration?

A. I do not mean to say that weakness would contribute to increase the chances of recovery but that the idiosyncrasy of the individual in such case would have much to do with it.

Q. If it is true that a strong vigorous person is more apt to die sooner than another less so, how do you account for such apparent anomaly?

A. In the case of a robust person the inflammation would be more intense; a vigorous person is more susceptible to inflammation.

Q. Then it must follow as a necessary consequence that the less vigorous the person, the longer he can resist.

A. Well, there are no absolute theories in medicine. There are persons who, although they seem to be weak, will nevertheless resist more than another much stronger. There are persons also on whom a certain medicine produces a greater effect than in others; it all depends on the idiosyncrasy of the individual.

85 Q. Can't you state definitely whether a person suffering from such injuries as have been described by you might be as apt to die within a week, two weeks, or perhaps a month?

A. Yes, it is very possible.

The COURT: That's all.

COUNSEL FOR DEFENDANT:

Q. Can you state to the court whether or not there is any substance which when applied to the skin produces the same effect as a blow?

A. No sir, well this with reference to counsel's question whether there is any substance which can produce the same effect as a blow.

COUNSEL FOR DEFENDANT: That's all.

The COURT: Then according to you a physician would hardly be able to tell the difference between the discoloration produced by the application of a corrosive substance on the skin and that caused by a blow?

A. If we are to judge simply by the outward appearance of the skin * * * but if you examine the cellular and muscular tissues and even the bones, that is a different proposition.

Q. The discoloration produced by the application of some medical substance can, in your opinion, be mistaken for that which occurs where the blow is followed by an inflammation of the muscles?

A. Judging by the color only?

Q. By everything.

A. If the physician looks into it carefully he can tell
86 whether it is a blow or not.

Q. And a substance powerful enough to produce a discoloration would in your opinion cause an inflammation as well?

A. If it is a caustic substance, yes.

Q. I mean a substance powerful enough to cause a discoloration only.

A. If the discoloration consists in the staining of the skin only and there is no inflammation, no—but if it causes congestion of the skin, then an inflammation may result.

Q. A substance which would cause a congestion of the skin would not, in your opinion, produce blisters on the skin and destroy same?

A. If the action of the substance upon the tissues is too strong, it may cause blisters on the skin; for instance, tincture of iodine would produce a certain ruddiness of the skin, and if applied repeatedly, it may cause blisters.

Q. Don't you think that tincture of iodine would destroy the skin?

A. If applied many times in succession, yes.

Q. And would the mere application of such substance, in your opinion, produce any inflammation at all?

A. If applied only once, no.

Q. Then if applied repeatedly, it would destroy the skin, would it not?

A. Yes, necessarily so.

Q. That's all.

COUNSEL FOR DEFENDANT:

Q. How many applications do you think would be neces-
87 sary to destroy the skin?

A. If each application consists of several coats, so to speak, of such substance, two or three applications would be enough; if you put two or three coats every time, two applications would be enough.

Q. Is there any native substance such as alipata, similar in effect to tincture of iodine?

A. I do not know about alipata, but there are other substances in the country, such as balungay, which causes a ruddiness of the skin.

Q. Then there are certain substances which when applied to the skin produce the same effects as a blow without causing blisters on the skin?

A. Of a similar aspect, yes.

Q. That's all.

The FISCAL: The prosecution rests.

COUNSEL FOR DEFENDANT: I have to ask the defendant whether he is willing that the defence should rest.

NOTE.—On this same morning counsel for defendant appeared and stated to the court that he had no further evidence to introduce, wherefore the defence also rests.

The COURT: You may now proceed with your argument.

After hearing the argument of both parties, the case was submitted and taken under advisement by the court.

88 I certify that the foregoing is a true and correct copy of the stenographic notes taken by me.

(Signed) MANUEL BLANCO,
Stenographer, Tenth District.

89 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of Occidental Negros.

Criminal Case No. 449.

THE UNITED STATES
vs.
GABRIEL DIAZ.

Homicide.

BACOLOD, *December* 24, 1907.

Judgment.

The charge against Gabriel Diaz is that the said accused on or about the 30th day of May, 1906, inflicted certain physical injuries upon one Cornelio Alcanzaren and that as a result thereof the latter died on the 26th day of June of the said year at the Hacienda "Subungcogon" within the jurisdiction of the municipality of San Carlos of this province.

The evidence for the prosecution sufficiently shows that on May 30, 1906, the deceased, Cornelio Alcanzaren, who was a laborer on the hacienda "San Antonio" within the jurisdiction of the town of

San Carlos, was assaulted by Gabriel Diaz, an employee of the said hacienda, who inflicted certain contusions or injuries upon his neck and abdomen. A complaint was filed and the Justice of the Peace of San Carlos, without first causing an examination of the injuries to be made, tried the defendant for a misdemeanor, to-wit, for assault and battery. He plead guilty and was sentenced to pay a fine.

90 From the time Alcanzaren was beaten by the accused until his death, which occurred June 26, 1906, he was unable, according to the evidence of record, to devote himself to his usual occupations on account of the severe pains from which he was then suffering as a result of the blows. On June 2nd and after the trial of the case in the Court of the Justice of the Peace, Maria Condeno, the deceased's mother-in-law, had her son-in-law removed from the hacienda "San Antonio" to a place within the hacienda "Subungcogon" near the hacienda "San Antonio" into the house of Fabian Aragan, where he died June 26th, 1906, twenty-seven days after he was beaten. During all this time Alcanzaren was unable to devote himself to his usual occupations, having suffered from no other ailment except the said pain in his neck and abdomen, which almost prevented him from taking any food.

The defendant does not deny that on May 30, 1906, he assaulted Cornelio Alcanzaren but sets up jeopardy as a defence on the ground that he has already been tried by the Justice of the Peace for the same offense and has attempted to show in an indirect manner that the deceased did not die as a result of blows.

That Cornelio Alcanzaren died as a result of the injuries inflicted upon him by the accused is apparent from the testimony of the witnesses who observed the course of deceased's sickness until he died, although some of those introduced by the prosecution tired to lessen the gravity of the offense; but the testimony of the Justice of

91 the Peace shows that the witnesses Crisanto Priano and Estanislao Francisco testified under oath in the manner set out in the preliminary investigation. The authenticity of their testimony cannot be doubted because the defendant himself subscribed his name thereto. It must, therefore, be deemed correct.

In addition to the report of the post-mortem examination held upon the body of the deceased there is evidence of the fact that the neck was entirely discolored. When the body was cut open on the right side coagulated blood issued from the incision and when the abdomen was opened it was found that the bladder was black as well as the stomach, liver and spleen, there being also visible a black trail in the abdominal region. The foregoing clearly shows that the injuries inflicted by the defendant upon the deceased affected some of the latter's internal organs, causing his death, the lack of proper medical attendance also contributing thereto. The fact that deceased died 27 days later and not sooner shows, in the opinion of the court, that Alcanzaren, being a common laborer, had a strong constitution which delayed to some extent the fatal consequences of the injuries received by him.

If the injuries on the neck were not such or of the nature above stated, the deceased would have undoubtedly recovered therefrom

within a few days; but in this case 27 days had elapsed and the neck still showed signs of discoloration; all of which goes to prove the seriousness of said injuries.

The black spot on the abdomen discovered by the doctor during the course of the examination made by him at defendant's
92 request was not due to the application of any caustic substance as the doctor apparently suspected. Such black spots as developed by the post-mortem examination were the outward signs of the internal injuries above described, likewise the swelling of the abdomen, which was a most natural consequence. The Justice of the Peace himself, in his report to the Provincial Governor, stated that the body showed signs of violence. All these circumstances, taken together, furnish conclusive evidence of the fact that the deceased, from the time he was beaten by the defendant until his death, was continuously sick as a result of the injuries received by him, the signs and traces of which could be seen even after his death.

The defendant has failed to show that the deceased was then suffering from any other disease. We must, therefore, assume that he died as a result of the injuries inflicted upon him by the accused.

The question of law raised by defendant's plea of double jeopardy cannot be properly considered in this case.

In order that jeopardy may be successfully invoked, it is an essential requisite that the trial court was competent to take cognizance of the matter upon a valid complaint. In the case at bar the complaint filed in the Justice Court of San Carlos was for assault and battery, whereas the one filed in this court is for manslaughter. The two complaints charge an entirely different crime, punishable under separate sections of the Penal Code. The facts upon which the defendant was tried in the Justice Court were not the same upon which he is being tried in this court, and if it were argued
93 that they are the same identical facts, we must necessarily conclude that the Justice of the Peace tried the defendant for an offense over which he had no jurisdiction.

If defendant's contention were sustained, the result would be that by means of certain arrangements with the injured party, persons guilty of crimes would avoid prosecution by the filing of a complaint for a mere misdemeanor, which would be an absurdity. The haste with which defendant pleaded guilty to the charge of assault and battery and the lack of zeal on the part of the Justice of the Peace, who failed to have the person injured properly examined for the purpose of ascertaining the true nature and extent of the injuries, in connection with the conclusive evidence of record, tend to convince this court that the prosecution for assault and battery was simply the means devised for the purpose of avoiding or defeating a subsequent prosecution.

The evidence of record fails to disclose the real motive for the offense, but it is to be presumed that it was deceased's failure to work in the hacienda "San Antonio."

The nature and location of the injuries shows that the aggression was unpremeditated and sudden and that the accused evidently lost all self control. Therefore the extenuating circumstances numbers

3 and 4 of the Penal Code should be taken into consideration in favor of the accused.

The offense in this case is covered by the provisions of section 404 of the Penal Code.

Wherefore, the court finds Gabriel Diaz guilty of the
94 crime of homicide and accordingly sentences him to the penalty of six (6) years and one (1) day of imprisonment, with the accessories provided by law, and to indemnify the heirs of Cornelio Alcanzaren in the sum of one thousand (1,000) pesos, and costs.

It is so ordered.

(Signed) VICENTE JOCSON,
Judge, Tenth District.

Thereafter and on the 17th day of January, 1908, the defendant excepted in writing to the foregoing judgment and gave notice to the court in due form of his intention to appeal to the Supreme Court of the Philippine Islands.

Thereafter, to-wit, on the 11th day of January, 1909, the case was duly received and filed in the Supreme Court of the Philippine Islands, and on April 10, 1909, the defendant filed his brief in said court, accompanied by the following assignment of errors:

I.

The trial court erred in deciding this case, the evidence for the prosecution not showing that the alleged crime was committed within the jurisdiction of the Court of First Instance of Occidental Negros.

II.

95 The court erred in finding that Gabriel Diaz had assaulted and beaten the deceased Cornelio Alcanzaren.

III.

The trial court having assumed that the assault was actually committed, it erred in declaring that the deceased after the assault was unable to devote himself to his usual occupations until he died.

IV.

The court erred in declaring that the assault, if any existed, was the cause of deceased's death.

V.

The court erred in overruling defendant's plea that he had been put once before in jeopardy of punishment for the same offense.

On July 24*m* 1909, the Attorney-General filed his brief and the case was duly argued and submitted on the merits, December 20th, 1909.

On February 2, 1910, the Supreme Court rendered the following decision:

96 THE UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 5155.

THE UNITED STATES, Plaintiff and Appellee,
versus
GABRIEL DIAZ, Defendant and Appellant.

TORRES, *J.*:

At about 7 o'clock on the morning of the 30th of May, 1906, Cornelio Alcansaren, a laborer employed on the hacienda of San Antonio, approached Gabriel Diaz, an employee in charge of said hacienda, and asked to be excused from work that day because he had been confessed the day before in preparation for his marriage. Diaz became angry and, instead of granting the permission asked for, ill-treated the laborer, Alcansaren, striking him with his closed fist and kicking him, thereby inflicting upon the said laborer various contusions and bruises, in consequence of which the ill-treated man was rendered unable to work and took to his bed, where he was confined until he died at 5 o'clock on the afternoon of June 26,
97 following.

The affair was reported on the 31st of May, 1906, to the justice of the peace of San Carlos, within whose jurisdiction the said hacienda lay. The justice at once investigated the matter, and, after examining some witnesses on June 4, 1906, sentenced the accused to pay a fine of 50 pesetas and costs.

However, as the injured party died on the 26th of said month, the justice of the peace, by order of the Court of First Instance, ordered Luis García Suarez, a Spanish surgeon, to make a post-mortem examination of the body of the deceased. After the autopsy, the surgeon reported he had found discolorations upon the neck, and abrasions upon the throat, both sides, and the abdomen, from which discolored blood emanated; the stomach, bladder, kidneys, liver, and the spleen were discolored, whereupon the justice of the peace found the accused to be guilty of homicide and forwarded the preliminary investigation to the provincial fiscal.

On the 5th of September of the same year, the last-named officer filed a complaint with the Court of First Instance, charging Gabriel Diaz with the crime of homicide. Proceedings were instituted, and the trial court entered judgment on the 24th of December, 1907, sentencing the accused to the penalty of six years and one day of *prisión mayor* and the accessory penalties, to indemnify the heirs of the deceased in the sum of P1,000 and to pay the costs. From said judgment the accused appealed in writing on the 17th of January, 1908.

From the above-stated facts it appears that the crime of
98 homicide, defined by article 404 of the Penal Code, has been fully proven, inasmuch as it has been satisfactorily estab-

lished in the present case that in consequence of blows with the closed fist and kicks inflicted upon Cornelio Alcansaren, an agricultural laborer, on the morning of May 30, 1906, he received serious internal injuries in the neck, sides, stomach, and lower abdomen, which caused his death on the afternoon of June 26, 1906.

The accused, Gabriel Diaz, pleaded not guilty to the charge of homicide, but to the charge for misdemeanor brought before the justice of the peace of San Carlos, Occidental Negros, upon being informed of the complaint presented on the 31st of May, by Maria Condeno, the mother-in-law of the deceased, he answered that he would plead guilty because he had given the latter two or three slaps in the face.

Notwithstanding the deficiencies and irregularities that are observed in the prosecution of this case, the following undeniably took place: "That Cornelio Alcansaren was cruelly maltreated by being punched and kicked by Gabrial Diaz on the morning of May 30; that in consequence of said maltreatment the injured man was rendered unable to work and became seriously ill; that, prostrated in bed and unable to urinate, he was found on the following day, first by two policemen who went to see him, and afterwards by the justice of the peace who called at the house; that the said justice of the peace testified that the injured man had the right thumb dislocated, a black swelling in the abdomen, at the navel, a scratch on
99 the right side of the chest, another on the throat, and a contusion in the face; he said that the scratches were not serious, but that the contusions in the abdomen and chest appeared of doubtful prognosis, all of which details were corroborated by the result of the autopsy; that besides the injured man and his mother-in-law, several eye-witnesses, Fabian Aracan, Miguel Bataen, and Juan Lanag, testified to the truth and reality of said maltreatment, the two last named having testified in the first trial for misdemeanor; that twenty-eight days after the aggression the injured man died on the afternoon of the last day, and the record does not show that his death was due to illness, other than that produced by the illtreatment he received. All this was shown in the proceedings in said trial (folios 36-40) as well as in the preliminary investigation made by the aforesaid justice of the peace after the 27th of June, following the death of the injured man, by virtue of the complaint filed by his mother-in-law, Maria Condeno, wherein appears the result of the autopsy previously referred to.

Hence the culpability of the accused Gabriel Diaz as the sole convicted principal in causing the violent death of Cornelio Alcansaren is evident and unquestionable; his exculpatory allegations can in no manner weaken or destroy his own confession to having illtreated the man by giving him only two or three slaps, nor the testimony of various witnesses who saw the accused punch the deceased and with his shoes on, kick him, nor the result of the post-mortem
100 examination of the body, on which signs of internal injuries were found in the neck, stomach, and lower abdomen.

Not the least proof is contained in the record that the injured man died in consequence of disease, and lacking proof to the contrary, it

must be presumed that he was in good health on the morning of May 30, 1906, and inasmuch as it appears from the record that after the illtreatment Alcansaren commenced to suffer pains in various parts of his body, that he could not drink water, swallow any food, urinate, nor much less work, and death came twenty-eight days thereafter, signs of violence being discovered in the interior of his body; it follows that Diaz, who illtreated him, is logically responsible for his death, because it has not been proven that he lost his life by reason of causes other than the illtreatment that he received.

The defense, in order to prevent the prosecution and trial of the case, pleaded that the accused had already been placed in jeopardy, having been tried, convicted, and condemned to pay a fine of 50 pesetas and costs by the judgment rendered by the justice of the peace of San Carlos in the action brought for maltreatment, and as *prima facie* evidence presented the record of the preliminary investigation, at the foot of which the proceedings had in said trial for misdemeanor appear (folio 45).

As the above plea was overruled, the accused only offered as evi-
dence at the trial a certified copy of the proceedings at the
101 trial for misdemeanor, which appears attached to the record
of the preliminary investigation at folios 36-40, forwarded by the aforesaid justice of the peace to the provincial fiscal of Occidental Negros in view of the fact that the accused had committed the crime of homicide, and it was the duty of the latter official to have produced the same in the Court of First Instance upon the filing of his complaint for the said crime.

Therefore, the record of the preliminary investigation and the proceedings in the trial for misdemeanor were offered in the present case by the defense as evidence that the accused had already been in jeopardy, and subsequently, at the close of the trial, the defense again presented them as such evidence. In view of the repeated presentation of the record of said trial, it was not necessary for the provincial fiscal to offer the said proceedings for a third time as evidence for the prosecution, and he is entitled to avail himself of them to prove the crime and the guilt of the principal, inasmuch as it is a rule of law that a document presented in evidence by one party may likewise be used by the adverse party as evidence for his cause of action.

If in the opinion of the defense the copy of the proceedings at the trial prove his plea of jeopardy, and to that end he presented it, together with the proceedings in the preliminary investigation, the contents of both clearly prove the crime and the guilt of the accused. Still further, taking into account merely the result and the merits of
the proceedings in the action for misdemeanor, one acquires
102 the fullest conviction, beyond peradventure of doubt, that
Gabriel Diaz inflicted the illtreatment that occasioned the violent death of Cornelio Alcansaren.

A calm, careful, and impartial examination of the case discloses the helpless and abandoned conditon in which the illtreated man was left in his house, without attendance by a physician or even a curandero up to the time of his death; the haste made by the justice

of the peace of San Carlos to try the charge for misdemeanor; that of the author of the illtreatment in pleading guilty and complying with the sentence by paying the fine of P10 and costs imposed upon him; and, as the proceedings commenced, the reluctance of the witnesses, most of whom were laborers of the hacienda in which the accused worked as clerk, to appear and testify in the case, to the extent that at the request of the fiscal an order for the arrest of the witnesses for the prosecution had to be issued, and after being arrested, they testified in a manner and in such terms that, as the Attorney-General states in his brief, lead one to presume that the first trial was fraudulently prepared by the accused.

Notwithstanding the fact that the action of the provincial fiscal has been obstructed in this case, in which there should have been displayed more zeal in the performance of duties prescribed by the law, and that, of the four witnesses offered in the Court of First Instance, Tomas Ferrer, a laborer from the hacienda of Sugbungcogon, said he did not know what was the cause of the death
103 of the injured man, Estanislao Francisco did not remember anything that had occurred and denied having testified before the justice of the peace of San Carlos, although said official contradicted him and averred that the witness Estanislao testified under oath to the declaration that appears in the record of the preliminary investigation; yet, Matias Ferrer, a clerk of said hacienda, affirmed that Cornelio died in consequence of the illtreatment he received thereat, although he did not know who inflicted it; and Santos Priano declared in turn that he testified in the preliminary investigation that the injured party had died in consequence of the maltreatment inflicted by Gabriel Diaz, and further stated that, with regard to the other points of his declaration, he heard them from the deceased while living, and from the latter's cousin, Fabian Aracan. In spite of the behavior of the witnesses, the sum of this testimony does not indeed favor the accused, but on the contrary, supports the evidence presented in the proceedings had before the court of the justice of the peace.

The plea that the accused had already been placed in jeopardy when charged and prosecuted for misdemeanor before the justice of the peace of San Carlos and sentenced to pay a fine, is not in accordance with the law for the reason that the act he was charged with committing constituted a crime, and the said justice of the peace by whom he was improperly tried was incompetent and had no jurisdiction in the case. (U. S. vs. Ballentine, 4 Phil. Rep., 672; Supreme Court of the United States in the matter of Grafton, 11 Phil. Rep., 776.)

104 The Court of First Instance, when dismissing by its ruling of the 26th of September, 1906, the plea of jeopardy, rightly stated, among other reasons, that—

If it were lawful for a justice of the peace court to try a case for homicide, abuses and arbitrary conduct would then be matters of everyday occurrence, and in many cases crime would go unpunished, since I consider that in towns where the accused is an influential resident, collusion would be very possible.

Apart from the impropriety of the plea of jeopardy, there appears the fact that, in alleging it, the representative of the accused practically acknowledged and admitted the facts attributed to him, and set out in the complaint as constituting the crime of homicide, the same that were denounced by Maria Condeno, the victim's mother-in-law, before the justice of the peace who illegally qualified them as a misdemeanor. The defense has not even tried to show they were false nor has he endeavored to disprove the charge, but on the contrary, the accused pleaded guilty to the charge of maltreatment.

Notwithstanding the rage and excessive cruelty with which, judging from its fatal consequences, the maltreatment was carried out, it is yet possible to admit that the author of the same did not intend to commit an evil so serious as the death of a person (circumstance 3, art. 9, Penal Code), but the fact that the injured man had failed to work one day in the hacienda because he had been confessed in anticipation of his marriage, can not be considered as a cause determining loss of reason and self-control, the seventh of the said article, on the part of the accused whereby the penalty imposed by
105 the law should be applied in its minimum degree.

For the reasons above set forth, in which the errors assigned to the trial court have been refuted, it is our opinion that the judgment appealed from should be reversed, and that Gabriel Diaz should be sentenced, as we do hereby sentence him, to the penalty of fourteen years of reclusión temporal, with the accessory penalties of article 59 of the Penal Code, to indemnify the heirs of the deceased in the sum of P1,000, and to pay the costs of both instances, and it is so ordered.

(Signed) FLORENTINO TORRES.

Concurring:
(Signed) C. S. ARELLANO, *C. J.*
VICTORINO MAPA,
E. FINLEY JOHNSON,
SHERMAN MORELAND,
C. B. ELLIOTT, *JJ.*

CARSON, *J.*, dissenting:

I dissent.

In my opinion there is no competent evidence in the record upon which the findings of fact by the trial court should be sustained.

106 On February 14, 1910, final judgment was rendered as follows:

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
versus
GABRIEL DIAZ, Defendant and Appellant.

Judgment, February 14, 1910. Judgment Book No. —, p. —.
File No. 5155.

The Court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the Court upon the record, its decision and order for judgment having been filed on the 2nd day of February, A. D. nineteen hundred and ten.

By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Occidental Negros, dated the 24th day of December, nineteen hundred and nine, and from which the above-entitled appeal was taken, be, and the same is hereby, reversed and the defendant Gabriel Diaz is sentenced to the penalty of fourteen years of imprisonment with the accessories of section 59 of the Penal Code, to indemnify the heirs of the deceased in the sum of one thousand pesos, with the costs of both instances, those of this court amounting to 24 pesos to be collected by the trial court by execution duly issued.

107 It is further ordered that the said cause be remanded to the Court of First Instance.

[SEAL.] (Signed) J. E. BLANCO.
Clerk of the Supreme Court of the Philippine Islands.

On February 16, 1910, defendant excepted to the foregoing judgment and moved for a rehearing which was denied by the Supreme Court, and to the order of the court overruling his motion he also duly excepted February 24, 1910.

108 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. —.

UNITED STATES, Plaintiff and Appellee,
versus
GABRIEL DIAZ, Defendant and Appellant.

Now comes Gabriel Diaz, defendant and appellant in the above entitled cause, and represents:—

I.

That judgment has been rendered in the above entitled action convicting and condemning the said defendant for the offence of homi-

cide to fourteen years of imprisonment, to the accessory penalties of Article 59 of the Penal Code, to the payment of an indemnity in the sum of P1,000, and to the payment of costs in both instances, all in violation of the provisions of the Act of Congress of July 1st, 1902, as more fully appears in the assignment of errors which accompanies this petition.

Wherefore petitioner prays that he be granted a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands with a supersedeas of the aforesaid judg-
109 ment, and that upon the execution and approval of a bond in such sum as may be deemed expedient and sufficient, conditioned as required by law, he be admitted to bail pending such writ of error in order that the judgment may be revised by the Supreme Court of the United States upon the assignment of errors presented with this petition.

He also prays that an order may duly issue requiring the record of the above entitled cause to be translated into the English language in accordance with the rule of the Supreme Court of the United States in such cases made and provided.

(Signed) HAUSSERMANN, ORTIGAS, COHN & FISHER,
By CHARLES C. COHN,
Attorneys for Petitioner.

110 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. —.

UNITED STATES, Plaintiff and Appellee,
versus
GABRIEL DIAZ, Defendant and Appellant.

Now comes the accused and appellant in the above entitled cause and, in conjunction with his petition praying for a writ of error, presents this assignment of errors alleged to have occurred at the trial and in the decision of the said cause, to-wit:—

1. The Court has committed error in concluding that the proofs are sufficient to convict the accused of the offence charged.

2 The Court has committed error in declaring improper the objection that the accused has been placed in jeopardy twice for a single act.

3. The Court has committed error in holding that the copy of the proceedings and trial in the Court of the Justice of the Peace offered in support of the objection of jeopardy is competent to prove the guilt of the accused in this cause.

4. The Court has committed error in holding as competent proof of the guilt of the accused a copy of the testimony of witnesses given

on another occasion in another cause before another tribunal and not in the presence of the accused.

5. The Court has committed error in holding that the Court of First Instance of Occidental Negros had jurisdiction of the subject matter of this cause.

111 6. The Court has committed error in holding that the mistreatment received by the deceased was the cause of his death.

7. The Court has committed error in holding that it was incumbent upon the accused to demonstrate and prove that the cause of the death of the deceased was a cause distinct and independent of the mistreatment received by him.

8. The Court has committed error in holding that the trial misdemeanor, wherein the accused has been tried, convicted and condemned, was a fraudulent act on the part of the accused.

9. The Court has committed error in holding that the accused has incurred the responsibility provided in Article 404 of the Penal Code.

10. The Court has committed error in not dismissing this cause.

11. The Court has committed error in refusing to acquit the accused in this cause.

12. The Court has committed error in sentencing the accused to the penalty of 14 years of imprisonment, the accessory penalties provided in Article 59 of the Penal Code, the payment of an indemnity of P1,000 to the heirs of the deceased, and to the payment of the costs in both instances.

Wherefore, the accused and appellant prays that the decision of the Supreme Court of the Philippine Islands may be reversed and the dismissal of this cause and the acquittal of the accused ordered.

Dated Manila, P. I., Feb'y 24, 1910.

(Signed) HAUSSERMANN, ORTIGAS, COHN & FISHER,
By CHARLES C. COHN,
Attorneys for Plaintiff in Error.

112 UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Justices of the Supreme Court of the Philippine Islands, Greetings:

Because in the record and proceeding, and also in the rendition of the judgment in a cause which is in said Supreme Court of the Philippine Islands before you, between the United States, complainant and appellee, and Gabriel Diaz, accused and appellant, a manifest error has happened to the great damage of said accused and appellant, Gabriel Diaz, as by this complaint appears:

We, being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ, so that

you may have the same in the City of Washington on the — day of —— next, in said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of February, in the year of our
113 Lord nineteen hundred ten and of the independence of the United States of America the one hundred and thirty-fourth.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Secretary of the Supreme Court of the Philippine Islands.

Let the foregoing writ of error be allowed in so far as concerns the question of double jeopardy and let the same operate as a supersedeas of the judgment and sentence complained of upon the execution of a bail bond by Gabriel Diaz in the sum of One Thousand Pesos (P1,000), to respend for costs, and another in the sum of Six Thousand Pesos (P6,000), payable to the defendant in error upon the conditions required by law, for his liberty during the pendency of said writ of error, both bonds to be approved by the undersigned.

March 1st 1910.

[Seal Corte Suprema, Islas Filipinas.]

FLORENTINO TORRES,
Justice of the Supreme Court of the Philippine Islands.

114 UNITED STATES OF AMERICA:

To the Attorney General of the Philippine Islands, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington within 120 days from the date of this citation pursuant to a writ of error filed in the office of the Secretary of the Supreme Court of the Philippine Islands, wherein Gabriel Diaz is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the plaintiff in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States of America, this first day of March, in the year of our Lord nineteen hundred ten, and of the Independence of the United States of America the one hundred thirty-fourth.

[Seal Corte Suprema, Islas Filipinas.]

FLORENTINO TORRES,
Associate Justice of the Supreme Court of the Philippine Islands.

Received copy this 5th day of March, 1910.

GEO. R. HARVEY,
Solicitor General.

115 *Personal Bail Bond.*

THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES
versus
GABRIEL DIAZ.

Whereas, the above-entitled cause was decided on appeal on the 2nd day of February, 1910, by the Supreme Court of the Philippine Islands and the defendant Gabriel Diaz was sentenced to the penalty of fourteen years of imprisonment, with the accessories provided in section 59 of the Penal Code, and to indemnify the heirs of the deceased in the sum of one thousand pesos, Philippine currency, and to pay the costs of both instances; and

Whereas the said Gabriel Diaz has taken an appeal from the judgment of the Supreme Court of the Philippine Islands to the Supreme Court of the United States of America; and he having been allowed bail in the sum of six thousand pesos, Philippine currency, to answer for his appearance, and one thousand pesos to respond for such costs as the appellee may incur;

Now, therefore, we, Luchsinger & Co. of Iloilo and Ruperto Montinola of Iloilo, Philippine Islands, by these presents, do hereby, jointly and severally, bind ourselves that the said Gabriel Diaz shall appear for sentence before the court competent to try him,
116 and that he will be at all times ready to submit himself to the orders and decrees of the said court; and that in case of conviction he will appear for judgment and deliver himself for the execution of the same, and in case of failure to comply with any of these obligations, to pay to the United States of America the sum of six thousand pesos, Philippine currency; and in case of the judgment being affirmed, to pay whatever costs the appellee may incur to the extent of one thousand dollars, Philippine currency.

Iloilo, April 9, 1910.

(Signed) LUCHSINGER & CO.
(Signed) RUPERTO MONTINOLA.

PROVINCE OF ILOILO,
Philippine Islands, ss:

We, Luchsinger & Co., represented by Mr. S. E. Luchsinger, and Ruperto Montinola, having been first duly sworn in accordance with the law, solemnly declare, each for himself, that he is a resident and property owner of the Philippine Islands and that he is in fact solvent in the amount fixed in the said bond, to-wit, six thousand dollars, Philippine currency; and that in case the judgment be affirmed they will pay whatever costs the appellee may incur to the extent of one thousand dollars, Philippine currency,

exclusive of all other obligations and debts that they may have, and property which cannot be attached by reason of the said bond.

(Signed) LUCHSINGER & CO.
(Signed) RUPERTO MONTINOLA.

117 Subscribed and sworn to before me this 9th day of April, 1910, Mr. S. E. Luchsinger exhibiting his registration certificate No. F895,483, issued at Iloilo January 27, 1910, and Mr. Ruperto Montinola exhibiting his registration certificate No. F895,044, issued at Iloilo January 18, 1910.

(Signed) JOSE ATADERO,
[NOTARY'S SEAL.] *Notary Public.*

My commission expires December 31, 1910.

Approved:

(Signed) FLORENTINO TORRES,
Associate Justice of the Supreme Court of the Philippine Islands.

118 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

CITY OF MANILA,
Philippine Islands, ss:

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing one hundred and seventeen (117) pages of typewritten matter contain a full and correct transcript and translation of the record and proceedings in the foregoing entitled cause, and in obedience to the Writ of Error heretofore issued, I herewith transmit the same to the Supreme Court of the United States of America this 11th day of June, 1910.

Witness my hand and the seal of the Supreme Court of the Philippine Islands this 11th day of June, 1910.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

119 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

UNITED STATES
vs.
GABRIEL DIAZ.

Now comes the plaintiff in the above-entitled cause and respectfully asks the Court to extend the time for the filing and docketing

of the transcript in the office of the Clerk of the Supreme Court of the United States, so that the same will not expire before the 31st of July, 1910.

Manila, June 15, 1910.

HAUSSERMANN, COHN & FISHER,
p. p. CHARLES C. COHN,
Attorneys for Plaintiffs in Error.

Order.

It having been made to appear that the translation of the record in this case and the preparation of the transcript can not be completed within the time allowed for the docketing and filing of this case in the Supreme Court of the United States at Washington, it is hereby enlarged so that it will not expire before the 31st of July, 1910.

Witness my hand this 16th day of June, 1910.

[Seal Corte Suprema, Islas Filipinas.]

____ ____,
Associate Justice of the Supreme Court of the Philippine Islands, Who Granted the Writ of Error in this Case.

Witness my hand this 16th day of June, 1910.

GRANT TRENT,
Associate Justice Supreme Court, Acting in Vacation.

120 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

UNITED STATES
vs.
GABRIEL DIAZ.

Now comes the plaintiff in the above-entitled cause and respectfully asks the Court to extend the time for the filing and docketing of the transcript in the office of the Clerk of the Supreme Court of the United States, so that the same will not expire before the 31st of July, 1910.

Manila, June 15, 1910.

HAUSSERMANN, COHN & FISHER,
p. p. CHARLES C. COHN,
Attorneys for Plaintiff in Error.

Order.

It having been made to appear that the translation of the record in this case and the preparation of the transcript can not be com-

pleted within the time allowed for the docketing and filing of this case in the Supreme Court of the United States at Washington, it is hereby enlarged so that it will not expire before the 31st of July, 1910.

Witness my hand this 16th day of June, 1910.

[Seal Corte Suprema, Islas Filipinas.]

FLORENTINO TORRES,
Associate Justice of the Supreme Court of the Philippine Islands, Who Granted the Writ of Error in this Case.

Witness my hand this 16th day of June, 1910.

[SEAL.]

GRANT TRENT,
Associate Justice Supreme Court, Acting in Vacation.

Endorsed on cover: File No. 22,305. Philippine Islands Supreme Court. Term No. 384. Gabriel Diaz, plaintiff in error, vs. The United States. Filed August 27th, 1910. File No. 22,305.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

GABRIEL DIAZ, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 684.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION TO ADVANCE.

This is a writ of error to the Supreme Court of the Philippine Islands to review a judgment of that court, and involves the question whether the defendant has been twice placed in jeopardy. It appears that on May 30, 1906, Diaz, becoming angry with a laborer employed by him, illtreated the latter—striking him with his closed fist and kicking him—as a result of which the injured man was confined to his bed until June 26 following, when he died. On the 31st of May, 1906, the affair was reported to the local justice of the peace, who investigated the matter, and, after examining some witnesses on June 4, 1906, sentenced the accused to pay a fine of 50 pesetas and costs. After the death of the injured man a post-mortem examination of his body was made, with

the result that a complaint charging Diaz with homicide was filed in the Court of First Instance. A trial was had, and on December 24, 1907, the accused found guilty and sentenced to six years and one day imprisonment, to indemnify the heirs of the deceased, and to pay costs. From that judgment the defendant appealed to the supreme court of the Philippine Islands, which reversed the judgment below and sentenced Diaz to the penalty of 14 years of reclusión temporal, with certain accessory penalties, to indemnify the heirs of the deceased, and to pay costs. To review that judgment this writ of error is sued out.

It appears from the transcript of the record that the defendant is at large on bail in the sum of 6,000 pesos, pending the decision of this court.

The Solicitor General moves the court to advance the case in accordance with the provisions of rule 26, section 3, and assign it for hearing on a day convenient to the court during the next term.

Notice of this motion has been served on opposing counsel.

FREDERICK W. LEHMANN,
Solicitor General.

MAY, 1911.

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Supreme Court of the United States

OCTOBER TERM, 1911,

NO. 384

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JAMES H. McKENNEY,
Clerk

GABRIEL DIAZ,

Plaintiff-in-Error,

vs.

THE UNITED STATES.

BRIEF EOR PLAINTIFF IN ERROR

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Plaintiff-in-Error,
2 Rector Street,
New York City.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 384.

GABRIEL DIAZ,
Plaintiff in Error,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Brief for Plaintiff in Error.

This is a writ of error to review a judgment of the Supreme Court of the Philippine Islands, dated February 14th, 1910 (Rec., p. 54), reversing a judgment of the Court of First Instance of Occidental Negros, and sentencing the plaintiff in error upon a charge of homicide to fourteen years' imprisonment, costs, and payment of indemnity to the heirs of the deceased.

The Court of First Instance had, by its judgment of December 24th, 1907, found the defendant guilty, but with extenuating circumstances,

and sentenced him to imprisonment for six years and one day, besides payment of costs and indemnity (Rec., pp. 45-48). The Supreme Court on appeal thus *more than doubled the sentence* as well as overruled the constitutional objections raised below.

Statement of Facts.

On May 30th, 1906, the plaintiff in error, Gabriel Diaz, a native Spaniard, employed as a clerk upon the Hacienda of Ramon Lopez, had an altercation with Cornelio Alcanzaren, a Filipino laborer upon the same Hacienda. On the following day Cornelio's mother-in-law, Maria Condeno, laid a complaint before the Justice of the Peace of San Carlos, charging Diaz with assault and battery by "blows with the fist and kicks," and alleging that Alcanzaren was in a dying condition (Rec., p. 20). A warrant was issued for Diaz, who came into Court and pleaded "guilty of having slapped Cornelio in the face two or three times for being disrespectful to him" (Rec., p. 20). The Justice of the Peace then held Diaz for trial and proceeded to make an investigation. On June 1st, the Justice went to Alcanzaren's house, took his *ex parte* statement and made a physical examination of his body. He also took the depositions of several witnesses, some in the presence of defendant and others apparently in his absence (Rec., p. 21). On June 2nd, 1906, Alcanzaren appeared in Court, *and after a careful examination of his body the Court failed to find any injuries of a serious character or such as to require medical treatment* (Rec., pp. 22 and 40).

On June 5th, 1906, the Justice found Diaz guilty of the misdemeanor of assault and battery and fined him fifty pesetas and costs, which he immediately paid (Rec., p. 22).

On June 26th, 1906, Alcanzaren died, and on the following day his mother-in-law presented to the same Justice a further complaint against Diaz, charging him with homicide (Rec., p. 2). He was arraigned, pleaded not guilty and was admitted to bail (Rec., p. 3). On June 27th, an examination of the body of the deceased was made. The only physician participating (Dr. Suarez) reported that it was impossible to arrive at any definite conclusion as to the cause of the death (Rec., p. 6). On the next day (June 28th), an autopsy was made by the same physician (Rec., p. 8). The report of the autopsy expressed the same opinion and added that there were "*strong indications that death was due to a disease of an infectious nature*" (Record, p. 19).

On June 29th and 30th and July 3rd, 5th and 9th, the preliminary examination was continued. The complainant, Maria Condeno, and several other witnesses testified. None of them claimed to have been an eye-witness of the altercation. Their testimony related to the condition of Alcanzaren, and to his declared opinions concerning the probable result of his alleged injuries. It appeared from this testimony that Alcanzaren was not attended by any physician "because he did not want one" (Rec., p. 10); that on the afternoon of the day when he attended Court, he moved to another Hacienda (Rec., p. 11); that shortly thereafter he applied for work, and worked on a fishing net during three days (Rec., pp. 11, 12 and 31).

On July 9th, 1906, the Justice rendered a decision *based largely* on the record of the assault and battery case, finding Diaz "guilty of the crime of homicide," and directing that the proceedings be forwarded to the provincial fiscal for action (Rec., p. 23).

The provincial fiscal on September 5th, 1906, filed a complaint in the Court of First Instance, charging that "Gabriel Diaz did on the 30th of May, 1906, assault and beat Cornelio Alcanzaren and that as a result thereof the latter died on the 26th of June last" (Rec., p. 24). On September 19th, Diaz was arraigned and on September 21st, interposed a plea of former jeopardy, supported by the record of the assault case (Rec. p. 26). On September 26th, this plea was overruled and Diaz then pleaded "not guilty" (Rec., p. 26). The trial was held in the Court of First Instance, after several adjournments, on August 15th and 29th and September 20th and 21st, 1907. Several sessions were held in the absence of the defendant upon a telegraphic waiver from him (Rec., p. 29).

The evidence for the prosecution was in substance as follows:—Matias Ferrer testified that he knew Cornelio Alcanzaren, who came to him in the latter part of June, 1906, after his arrival at the Hacienda Subongcogon, "looking for work." He knew nothing of the altercation with Diaz or of the cause of Alcanzaren's death, except that, as he said, "*somebody told me* that he died as the result of the ill treatment received by him" (Rec., p. 30). Tomas Ferrer added nothing to the evidence given by Matias except that he had seen Alcanzaren at the Hacienda Subongcogon, "working repairing the fishing net." He knew nothing

about the condition of his health or the cause of his death (Rec., p. 32).

Santos Priano testified (Rec. p. 33) that he did not know the cause of Alcanzaren's death or whether there had been any quarrel or fight between Diaz and the deceased. His evidence on the preliminary hearing (where he is designated as Crisanto Periano) was read to him (Rec. pp. 33, 34, 12, 13), and he modified it by admitting that he was "simply repeating what Cornelio said", and that this was on an occasion "before he was taken sick, four weeks before he died", and that during those four weeks he met Cornelio several times "on the road at night walking," and that "he walked as though nothing was the matter with him." (Rec. p. 34.) Estanislas Francisco was then called and professed ignorance of the whole affair. His testimony on the preliminary hearing was read to him, and he confirmed his answer to the first question (that he knew Diaz and Alcanzaren) and declared "as to the remaining questions, I did not testify to what it says there." (Rec. p. 36).

Pelagio Carbajosa, agriculturist and former Justice of the Peace, being the Justice before whom the assault case was tried and the preliminary hearing conducted, then testified that the testimony of Francisco and Priano was correctly given in the record; that on the assault trial Diaz denied having struck Cornelio in the navel, and simply admitted that he slapped him in the face; that Cornelio's injuries were apparently slight, *and that "the deceased himself said that the injuries were slight and required no medical treatment"*. (Rec. pp. 39, 40).

The prosecution then rested. The defendant put in evidence the record of the assault case (Rec. p. 40) and on a subsequent day the prosecution by way of rebuttal called a physician, who testified as an expert that a blow with a hard instrument on or near the navel might cause internal injuries, from which death might possibly, but would not necessarily follow; that in such event the patient "would hardly live two weeks; that perhaps he might live as much as twenty-six days," but witness thought this "would be too long." (Rec. pp. 41, 42). He also said that if the patient worked during the twenty-six days, witness could not say that he died as a result of the blows, and that even if he did not work, "twenty-six days would be an unreasonable time and that it is not likely that death should have occurred as a result of the blows." (Rec. p. 42).

He also testified that there were certain chemical substances, which, if applied to the skin, would produce effects similar in aspect to the effect of a blow. (Rec. pp. 44, 45). The case was then closed without further evidence on either side.

On December 24th, 1907, the Court of First Instance rendered its decision, holding the defendant guilty of homicide. This decision was *expressly based in part on testimony which was not included in the evidence given before the Trial Court,* but only on the assault trial and on the preliminary hearing, and on sundry statements and reports which were not in evidence at all. (Rec. pp. 46, 47).

The defendant's plea of double jeopardy was reconsidered and again overruled, with a suggestion, for which no basis appears in the record, that the assault prosecution was collusive. The

Court further found that the extenuating circumstances specified by subdivisions 3 and 4 of Art. 9 of the Penal Code ("no intention of committing so grave an injury" and "sufficient provocation") existed, and fixed the punishment at six years and one day of imprisonment. (Rec. pp. 47, 48).

The defendant then appealed to the Supreme Court of the Philippine Islands. On February 2nd, 1910, that Court rendered its decision. This decision, like that of the Court of First Instance, was based, not on the record of the homicide trial alone, but also on the record of the assault trial and of the preliminary hearing, and on the *ex parte* statements of the Justice of the Peace, and of "two policemen" who did not testify, and the unsworn report of the autopsy. The decision is also stated to be based on "the testimony of various witnesses who saw the accused punch the deceased and, *with his shoes on,* kick him" (Rec. p. 50). The only evidence in regard to kicks is as follows: In the record of the assault case, there is a recital that Miguel Batacu stated that he brought Cornelio "before the accused, by the latter's orders, and upon his arrival Diaz kicked him and struck him in the face." On further examination, however, he testified to seeing Diaz strike Cornelio in the face, neck and shoulders, and that he (the witness) then went home (Rec. pp. 21, 22). Juan Lanag testified that he saw Diaz kick Cornelio "in the abdomen near the navel" (Rec. p. 21). This testimony was apparently taken by the Justice of the Peace *ex parte,* and not in the presence of the defendant. There was no other testimony in regard to kicks given in the assault case.

At the preliminary hearing on the homicide charge, there was no testimony whatever in regard to kicks. In fact there was no testimony by any eye witness of the encounter. The nearest approach to such testimony was the statement of Fabian Aragon, who said: "I was present when the defendant, Gabriel Diaz, *threatened* the deceased with bodily injury" (Rec. p. 15).

In the actual trial on the charge of homicide there was no testimony by any witness to the encounter. The Justice of the Peace testified that "according to the deceased" the contusion on the navel "was caused by a kick which the accused gave him." He was then asked: "Did the deceased state whether Diaz wore shoes when he kicked him?" and answered: "He said nothing about that" (Rec. p. 39). There is thus absolutely no evidence to support the Court's assumption of injuries caused by kicks with a shoe.

The Court's opinion then continues.

> "Not the least proof is contained in the record that the injured man died in consequence of disease, and lacking proof to the contrary, it must be presumed that he was in good health on the morning of May 30, 1906, and inasmuch as it appears from the record that after the ill-treatment Alcanzaren commenced to suffer pains in various parts of his body, that he could not drink water, swallow any food, urinate, nor much less work, and death came twenty-eight days thereafter, signs of violence being discovered in the interior of his body; it follows that Diaz, who illtreated him, is logically responsible for his death, because it has not been proven that he lost his life by reason of causes other than the ill-treatment that he received. (pp. 50-51, Rec.)"

This ignores that part of the report of the autopsy (which the Court refers to for other purposes) stating that there were "strong indications that death was due to a disease of an infectious nature" (Rec. p. 19). It also ignores the fact that the deceased applied for and actually performed some work in the interval between the encounter and his death.

The Court also proceeds upon the theory that the defendant's plea of guilty to having slapped Cornelio in the face was equivalent to a general plea of guilty to the "charge of ill treatment" and cast upon the defendant the burden of disproving the charge (Rec. p. 53).

There was absolutely no evidence even tending to prove that the death of the deceased was the result of any injury shown to have been inflicted upon him by the defendant. The expert testimony was founded upon the assumption of a blow "with a hard instrument" upon the navel (Rec. p. 41) for which there was no basis whatever in the Record.

It is to be observed that Mr. Justice Carson dissented on the ground that in his opinion there was "*no competent evidence in the record*" *to sustain the findings of the trial Court* (Rec. p. 53).

If this judgment be here sustained a man may be legally convicted in the Philippine Archipelago on testimony and *ex parte* statements not taken at the trial.

It is earnestly submitted that this not only violates basic postulates of American criminal law so carefully safeguarded in the Philippine Organic Act, but is inconsistent with the criminal law of all civilized nations. This case ineluctably involves a disposition of that proposition. No

subtleties of antiquated English case law nor mere word-juggling is here involved, but the simple legal decency prescribed by even the most "modernist" views of "due process" and "confrontation."

Specification of Errors.

The assignments of error presented upon the application for the writ of error (Rec. pp. 55, 56) may be more briefly stated as follows:

I.—The Court erred in convicting and not acquitting the defendant.

II.—The Court erred in not sustaining the defendant's plea of former jeopardy.

III.—The Court erred in holding that there was any evidence to sustain the conviction.

IV.—The Trial Court erred in admitting and the Philippine Supreme Court erred in considering the testimony of witnesses with whom the defendant was not confronted.

V.—The Court erred in holding that the burden of proof was upon the defendant to show that the death of the deceased was *not* caused by the acts of the defendant.

Brief of the Argument.

The argument on behalf of the plaintiff-in-error, (the defendant below and hereinafter so styled), may be summarized as follows:

This Court has jurisdiction by reason of certain questions involved, and, having jurisdiction,

has power to review the whole case and consider not only the constitutional and statutory questions, but the legality and justice of the conviction generally.

The conviction was based upon the testimony of witnesses with whom the defendant was not confronted, who were not even called upon the homicide trial, and whom the defendant therefore had no opportunity to confront and cross-examine with the charge of homicide in view. The homicide trial itself was allowed to proceed in part in the defendant's absence. This was a violation of constitutional legal requirements which the defendant had no power to waive and which his telegraphic waiver was wholly ineffectual to justify.

The defendant's plea of former jeopardy was good and should have been sustained. The charge of assault and battery and the charge of homicide involved precisely the same facts and the subsequent fact of death does not create a separate offence. It merely aggravates the degree of the offence; its essence, the unlawful beating, remains the same. For the unlawful beating the defendant has already been in jeopardy and paid the penalty. Upon the homicide prosecution the defendant, by express provision of the local law, might have been convicted of assault, and such prosecution therefore put him in jeopardy of punishment a second time for the same identical offence. The protection is not simply against a second punishment for the same offence; it is against any second jeopardy or danger thereof.

The conviction was not merely against the weight of the evidence, but was without any competent evidence whatever to support it. It was

based upon hearsay, upon *ex parte* unsworn statements, upon assumptions unsupported by evidence and presumptions unfounded in law, and upon a wholly erroneous theory as to the burden of proof. It was so manifestly erroneous in law and unjust in result that this Court could and should reverse it, irrespective of exceptions upon the trial or assignments of error upon the writ of review.

POINT I.

This Court has jurisdiction of the cause and power to review all questions involved therein.

The jurisdiction of this Court is based upon the provisions of § 10 of the Philippine Civil Government Act (32 U. S. Stats. 695), giving to this Court jurisdiction to review final judgments of the Philippine Supreme Court where the construction and effect of the Constitution or of any statute of the United States is involved. The case at bar turns chiefly upon the constitutional provisions forbidding double jeopardy and requiring confrontation with witnesses, which are expressly made applicable to the Philippine Islands by the Bill of Rights contained in § 5 of the Civil Government Act.

This brings the whole case before this Court for review.

> "Having jurisdiction of the case there exists the power to consider any question arising on the record."

See Penn Mutual Life Ins. Co. v. *Austin,* 168 *U. S.* 685 *at* 695;
also Giles v. *Harris,* 189 *U. S.* 475 *at* 486;

where it was said that where appellate jurisdiction exists, the review "opens the whole case."

See also Horner v. *United States, No.* 2, 143 *U. S.,* 570 *at* 577;
Burton v. *United States,* 196 *U. S.* 283, *at* 295.

This Court's power of reversal in the present case, therefore, is not limited to the two constitutional questions, but may be based upon any error of law appearing on the record.

POINT II.

The conviction was based upon the testimony of witnesses with whom the defendant was not confronted.

This point has already been presented to some extent in the Statement of Facts already given. The Court of First Instance and the Philippine Supreme Court expressly based their decisions upon matters not contained in any way in the evidence given on the homicide trial. To avoid prolixity, we will merely tabulate some of the most striking instances.

By the Court of First Instance:

1. The testimony given by two witnesses at the preliminary investigation (Rec., p. 46).

2. The unsworn report of the *post morten* examination. (do)

3. A report of the Justice of the Peace to the Provincial Governor, not contained in the record at all, unless it be the telegram of June 28, 1906, given on page 6 of the Record (Rec., p. 47).

By the Philippine Supreme Court:

1. The *ex parte* statement of Alcanzaren to the Justice of the Peace in regard to the reason for the altercation (Rec., pp. 21, 49).

2. The report of the autopsy (Rec., pp. 8, 49).

3. The report of "two policemen" never called as witnesses (Rec., pp. 20, 21, 50).

4. The unsworn report of the Justice of the Peace (Rec., pp. 20, 50).

5. The statements of two witnesses Bataeu (Batacu) and Lanag, given on the assault trial (Rec., pp. 20, 50).

6. The record of the preliminary investigation on the homicide charge (Rec., p. 50).

Considering all this in connection with the absolute barrenness of the record of the homicide trial of any evidence whatever in regard to the material and essential facts, it is manifest that the defendant was convicted, not upon the testimony of witnesses with whom he was confronted at his trial, but upon a mass of extraneous matter and

ex parte statements of persons whom he had no opportunity to cross examine with any serious charge in view.

Upon the assault trial, he pleaded guilty to a trifling assault. No substantial evidence of anything more serious was produced, he had no counsel, and no occasion to cross examine the witnesses produced against him. Upon the preliminary investigation, the only question before the Court was whether there was reasonable cause to believe that an offence had been committed and that the accused was guilty thereof (Phil. Comp. Stat. §3266). Here again there was no occasion for searching cross examination nor did the defendant have counsel.

The confrontation required by the Constitution and the Statutes must be a *confrontation upon the trial of the charge,*—otherwise it is illusory. As contained in the Constitution it is as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." (Article VI, Amendments to the Constitution of the U. S.)

This is substantially embodied in the Philippine Civil Government Act as follows:

> "§ 5. That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature

> and cause of the accusation against him, to have a speedy and public trial, *to meet the witnesses face to face,* and to have compulsory process to compel the attendance of witnesses in his behalf."
>
> (32 U. S. Stat. 692.)

The very exceptions which allow the use of depositions in certain cases show how carefully the right is safe-guarded.

See Phil. Comp. Stat. §3270 e., as follows:

> "Where the testimony of a witness for the prosecution has previously been taken down by question and answer in the presence of the accused or his counsel, the defense having had an opportunity to cross examine the witness, the deposition of the latter may be read upon satisfactory proof to the court that he is dead or insane or can not with due diligence be found in the Islands."

So important is this right that this Court has repeatedly held that it cannot be waived by the defendant and that he can not "legally consent that the trial proceed in his absence." See *Thompson* v. *Utah,* 170 U. S. 343, 354, citing and approving *Hopt* v. *Utah,* 110 *U. S.,* 574, in which this Court said by Mr. Justice Harlan:

> "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which

the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

There is no provision in the Philippine Statutes permitting a criminal trial to proceed in the absence of the defendant or dispensing with the confrontation rule, such as was considered by this Court in

West v. Louisiana, 194 *U. S.* 258.

On the contrary, the defendant's absolute right to be present is expressly recognized by Phil. Comp. Stat. §3270a, §3296, as follows:

"Sec. 3270. In all criminal prosecutions the defendant shall be entitled:

(a) To appear and defend in person and by counsel at every stage of the proceedings."

"Sec. 3296. The defendant must be personally present at the time of pronouncing judgment if the conviction is for a felony."

None of the conditions prescribed by Phil. Comp. St. §3270 *e. supra* existed. There is no suggestion that any of the witnesses on the assault trial or the preliminary hearing were kept away by the defendant. The use of such evidence against the defendant in the homicide trial was, therefore, in itself reversible error.

See

Motes v. United States, 178 *U. S.* 458.

The introduction of the record of the assault case upon the homicide trial was merely in support of the defendant's plea of former jeopardy, and was so recognized by the Court below (Rec. p. 51). Such record was merely *evidence of the jeopardy.* It was not, and could not be *evidence of the facts* which were in issue in the former trial.

See

Kirby v. United States, 174 *U. S.* 47 *at p.* 55.

The record of the preliminary hearing was not properly before the trial court for any purpose. It would appear to have been physically attached to the record of the assault case, which was put in evidence for a particular purpose, but *it was not itself offered by either party.* (See Rec. pp. 40, 51).

The conviction, therefore, was based upon evidence which the Court had no power or authority to consider, and should be set aside on this ground.

The fact that the actual trial was allowed to proceed in the absence of the defendant was another fatal defect, under the decisions of this Court above cited. The defendant's attempted waiver was wholly ineffectual.

If this judgment stand we have the anomalous situation presented in the Philippines of convictions for felonies at which the presence of the witnesses and of the defendant may be dispensed with. While resulting certainly in great simplification of criminal procedure its social advantages in other respects are surely open to grave question.

POINT III.

The defendant's plea of former jeopardy was good and should have been sustained.

This presents the question of law principally considered below. It may be thus stated in general terms: does a prosecution for assault and battery bar a second prosecution for homicide for the same act, where the person assaulted dies after the first and before the second prosecution? This question appears never to have been presented to this Court or to any American Court of high authority, and is, therefore, open, and to be determined on principle, particularly in view of the conflicting character of the precedents in other Courts.

The provision of the Philippine Bill of Rights upon which the plea is based is as follows:

> "§ 5. * * * No person for the same offense shall be twice put in jeopardy of punishment." * * *
>
> (§ 5 of Phil. Civ. Gov. Act.)

This is substantially the same as the corresponding provision of the United States Constitution, which is thus expressly made applicable to the Philippine Islands. The clause in the Constitution reads as follows:

> "Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb." (Article V, Amendments to the Constitution.)

The provision is again embodied in the Philippine Statutes as follows:

> "When a defendant shall have been convicted or acquitted or once placed in jeopardy upon an information or complaint, the conviction, acquittal, or jeopardy shall be a bar to another information or indictment for the offense charged, or for an attempt to commit the same, or for a frustration thereof, or for any offense necessarily therein included of which he might have been convicted under such complaint or information."
>
> § 3281 Phil. Comp. Stat.

This provision, as applied to the Philippine Islands, has been elaborately considered in this Court in several very recent cases:

> *See Kepner v. United States, 195 U. S. 100;*

Trono v. United States, 199 U. S. 521;
Gavieres v. United States, 220 U. S. 338.

In the Gavieres case the question of identity of offence was presented and it was held that where the same act constituted in itself two separate offences according to the circumstances with which it was accompanied, each offence might be separately prosecuted, and that hence a prosecution for causing a disturbance in a public place did not bar a second prosecution for conduct insulting to a public officer, based upon the same incident. That case is not an authority, however, for the decision of the Court below in the case at bar. It was based upon the consideration that different evidence was required to sustain the two prosecutions, and that in the second, evidence of an additional independent fact—the presence of a public officer—was necessary. There the independent fact was one of the contemporary attendant circumstances of the act itself, qualifying it, and making it, *at the time of its commission*, a separate and additional offence of a different kind.

In the case at bar, the only additional element in the homicide prosecution was the death of the person assaulted, a *subsequent* fact, claimed to be the *result* of the original offence, not changing its nature or character, but merely aggravating its degree.

As Blackstone pithily puts it:

> "Hereupon it has been held, that a conviction of manslaughter, as an appeal or an indictment is a bar even in another appeal, and much more in an indictment of murder; *for*

the fact presented is the same in both though the offenses differ in colouring and in degree."

Hammond's Blackstone, IV, p. 431.

This is strikingly illustrated by the language of the two charges. In the assault case it was alleged that the defendant threatened Diaz "with blows with the fists and kicks, inflicting several injuries upon his body * * * leaving him in a dying condition as a result of the said injuries" (Rec. p. 20). In the homicide case, the charge was that "Gabriel Diaz * * * did assault and beat Cornelio Alcanzaren, and that as a result thereof the latter died" (Rec. p. 24).

There appear to be two tests to which the Courts resort in applying the principle under discussion; identity of act, and *legal* identity of offence. This Court does not appear to be absolutely committed to either. In *Burton v. United States,* 202 U. S. 344 (at 380), *Carter v. McClaughry,* 183 U. S. 365 (at 395) and the Gavieres case *supra,* the Court indicated that to support the plea of former jeopardy, there should be an identity of offence in law as well as in fact, but in *Hans Neilsen, Petitioner,* 131 U. S. 176, this Court held that a conviction of *unlawful cohabitation* with more than one woman barred a prosecution for *adultery* at a *subsequent date,* with one of the same women, since the second offence was, in practical effect, included in the first. In that case there was neither identity in law, since each offence involved elements not involved in the other, nor even complete identity of act, since the adultery was subsequent to the period of unlawful cohabitation as charged, but the

adultery was regarded as an incident of the unlawful cohabitation and hence as practically "included in the first prosecution and thus brought within the spirit of the rule." This is entirely consistent with the underlying philosophy upon which the rule is based, namely, that prosecution should not become persecution. A man commits some act which contravenes the rules established to secure public order. Organized Society, represented by the Government, reserves and asserts the right to call him to account and punish him. That this power may not become an engine of oppression, it is limited by various safeguards, one of which is that the offender must have his day in Court, and that Organized Society, with its overwhelming force, must claim no more, but having once put him in jeopardy, must abide the event, and accept the result. This reasonable protection of individual liberty should not be frittered away by metaphysical dialectics concerning legal identity of offence. Society may protect itself by declaring a given act to be a crime, and punishing it accordingly. To make the same act constitute several different crimes and prosecute for them all *seriatim* opens possibilities of persecution which the rule against second jeopardy is designed and should be made effective to prevent.

This has been recognized in many leading cases.

In *State v. Cooper*, 1 *Green* (*N. J. Law*) 361, it was held that a conviction of arson might be pleaded in bar to an indictment for murder based on a death resulting from the arson. The Court said:

> "And that a simple consequence of an act should be severed from the act itself and

> possess independently all the necessary ingredients of crime, is a violation of sound philosophy, and as I think of law."

In *Queen v. Elrington*, 1 *B. & S.* 187, it was held that an acquittal on a charge of common assault barred a subsequent prosecution upon an indictment for wounding.

Chief Justice Cockburn said:

> "We must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, *and whether a party accused of a minor offense is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form.*"

So in *Reg. v. Miles*, 17 *Cox Cr. Cas.* 9, it was held that a conviction before a magistrate for assault barred an indictment for unlawful wounding, and that the plea was good whether the "circumstances of aggravation consist of the offence having been committed with malicious or wicked intent, or by reason that the committal of the offence was followed by serious consequences."

See also

Reg. v. Stanton, 5 *Cox Cr. Cas.* 324;
Wemyss v. Hopkins, *L. R.* 10 *Q. B.* 378;
Reg. v. King, 18 *Cox Cr. Cas.* 447.

The learned and witty Chief Justice Bleckley of the Supreme Court of Georgia, although recognizing that a different rule had been established in that State by the authority of precedent, declared his individual preference for "the same transaction test to the same evidence test." In a case involving a second prosecution for selling

liquor to a minor without permission by the minor's parents after a conviction for selling without a license, founded on the same sale, he said:

> "I have very grave doubt upon principle, whether a single act, although it may have violated two statutes or two sections of the penal code, will constitute two offences. The Government may at its election prosecute for either, but it would seem that one punishment ought to be a satisfaction of the law. Here was a single sale. At one end it required a license from the public, and at the other end it required a license from the parent or guardian. The act was carved into two parts. I analogize it in my own mind to cutting an earth-worm in two; both ends would be alive. The tail was prosecuted in the first proceeding, and now they prosecute the head, and both have been convicted."

See Blair v. *The State of Georgia*, 81 *Ga.* 629.

So in the dissenting opinion of Chief Baron Kelly in *Queen* v. *Morris, L. R. 1 Crown Cases Reserved,* 90, it was well argued that identity of act rather than of evidence or of technical legal nature of the charge should be the test.

There are several cases, of which the decision just cited is one, both in England and in this country (although none in this Court), which hold expressly that a former prosecution for assault does not bar a subsequent prosecution for manslaughter or murder, where the person assaulted thereafter dies, as it is claimed, from the effect of the injuries then received.

See *Reg. v. Salvi,* 10 *Cox Cr. Cas.* 481 (*note*);

Burns and Cary v. *The People*, 1 *Park. Cr. Rep.* (*N. Y.*) 182;
Commonwealth v. *Roby*, 12 *Pick.* (*Mass.*) 496;
Commonwealth v. *Evans*, 10 *Mass.* 25;
State v. *Littlefield*, 70 *Maine*, 452.

These decisions are inconsistent with the philosophy of the rule, and the distinctions sought to be drawn are insubstantial and unconvincing. The theory appears to be either that where "a new fact supervenes, for which the defendant is responsible" it "changes the character of the offence" and "constitutes a new and distinct crime" (*Littlefield* case, *supra*), or that it "does not change the character of the act," but "relates back to the time of the assault" (*Roby* case, *supra*). In other words, a man may first be prosecuted and punished for his act, and afterwards for its consequences.

The true historical explanation of this line of decisions appears to be that in the earlier cases (*Burns* Case and *Roby* Case, *supra*), the defendant, on the second prosecution for the graver offence, could not have been convicted of the lesser offence for which he had previously been prosecuted, since on an indictment for felony, at that time, the defendant must be either convicted of the felony or acquitted, and could not be convicted of a lesser offence involved in the felony. The importance of this consideration is illustrated by the exhaustive opinions in the interesting case of

Reg. v. *Bird*, 5 *Cox Cr. Cas.* 1 *and* 20.

This decision was rendered after the passage of an English statute providing that upon any indictment for felony, involving an assault, the jury might acquit of the felony and convict of the assault. The defendants had been tried for murder and acquitted, it appearing that the death of the deceased was not due to any assaults proved upon the trial. On a subsequent trial for assault, they pleaded *autrefois acquit*. The trial judge charged the jury that if they were satisfied that there were assaults which did not conduce to the death, they should convict. This conviction was affirmed by a closely divided court, the majority of which held, however, that the direction to the jury was not strictly correct, "as the question is not whether the assault actually conduced to the death of the deceased, but whether it was part of the very act or transaction which was charged as felony in the indictment" for murder.

Under the laws of the Philippine Islands, upon any prosecution the Court may convict of any subsidiary offence involved in the offence charged. See §3284 Phil. Comp. Stat. as follows:

> "The Court may find the defendant guilty of any offense, or of any frustrated or attempted offense, the commission of which is necessarily included in the charge in the complaint or information."

How broadly this is applied appears from the case of

United States v. Pineda, 4 *Phil. Rep.* 223,

where it was held that upon a complaint for frustrated assassination with a rifle, the defendant might be convicted of unlawful discharge of firearms.

Therefore in the case at bar, the defendant might upon the homicide trial have been convicted of the very assault for which he had already been prosecuted and fined. He has, therefore, been twice in jeopardy for the same offence, in violation of the United States Constitution and the Philippine Civil Government Act; his second prosecution was unlawful and his conviction should be set aside.

It is immaterial that the tribunal before which the lesser charge was tried had no jurisdiction to try the defendant on the greater charge. By the lawful exercise of jurisdiction over the lesser charge, a binding determination is reached either that the defendant is not guilty at all, or is guilty of the lesser offence and of that only. If the tribunal considers that there is probable cause for a prosecution upon the greater charge, the defendant may always be held for trial upon such charge by some court which has jurisdiction. This question was elaborately discussed and the above rule well stated in

Reg. v. Walker, 2 *Moody & Robertson*, 446.

The power of the Philippine Justice of the Peace to hold for trial by a higher Court is ample.

See § 3266 Phil. Comp. Stat. as follows:

"Upon the conclusion of the preliminary investigation, if the justice of the peace is of the opinion that there is reasonable cause to believe that an offense has been committed and that the accused is guilty thereof, he shall so declare and shall

adjudge that the accused be remanded to jail for safe-keeping to await the action of the Judge or Court of First Instance, unless he give bail for his appearance if the case be bailable. On the other hand, if the justice of the peace be of the opinion that no crime has been committed, or that there is no reasonable ground to believe the accused guilty thereof, the justice of the peace shall order the discharge of the accused. Such discharge, however, shall not operate as a final acquittal of the accused, but he may be again arrested and prosecuted for the same offense."

The practice of holding a defendant charged with assault, to await the result of the injuries inflicted, is well established and is a sufficient safeguard against the supposed dangers which are urged as a practical argument against the application of the second jeopardy rule to such a case as this.

POINT IV.

The conviction was without any competent evidence to support it and was contrary to law.

We do not ask this Court in this case to review any question of fact depending upon conflicting evidence. We do ask that the record of the homicide trial be examined to discover whether it contains any evidence whatever that Diaz inflicted any injuries upon Alcanzaren, or that any injuries so inflicted caused the latter's death. This presents not a question of fact, but a question of law. Even in reviewing a judgment based on the

verdict of a jury the Court can always consider "whether there was any evidence to sustain the conclusion reached."

See *Halsell* vs. *Renfrew*, 202 U. S., 287, 292.
Lancaster vs. *Collins*, 115 U. S., 222, 225.

This has already been discussed in the Statement of Facts and it has been shown that if the record of the assault case and of the preliminary hearing be eliminated, there is absolutely nothing left to support a conviction of any offence whatever. At the homicide trial no evidence was given of any acts of the defendant except his admission that he slapped Alcanzaren in the face, or of the cause of Alcanzaren's death. The medical testimony was expressly based upon the assumption of a blow with a hard instrument, for which there is no foundation anywhere. Presumptions were made as to the good health of the deceased at the time of the assault, for which there was no basis in law or in fact. No such presumption is included even among those enumerated by the Philippine Statute which provides for a large number of presumptions in civil cases.

See Phil. Comp. Stat. §§ 2764, 2765, printed in full in Appendix.

In criminal cases the statute prescribes that "the burden of proof of guilt shall be upon the prosecution, and the best evidence must be produced of which the case is susceptible" (Phil. Comp. Stat. § 3311). Facts adverse to the defendant therefore may not be proved by presumption.

The presumption of innocence on the part of the defendant was wholly disregarded, and the Court held that he was under the obligation of proving that the death of the deceased was *not* due to injuries which it was not even proved that he had inflicted. This was directly contrary to the statutory and common-law rule as to the burden of proof.

The presumption of innocence is expressly provided for by the Philippine Statutes.

See § 3309 Phil. Comp. Stat.

> "A defendant in a criminal action shall be presumed to be innocent until the contrary is proved, and in case of a reasonable doubt that his guilt is satisfactorily shown he shall be entitled to an acquittal."

And it is an integral and essential portion of the law of this country as laid down by this Court.

See

Kirby v. *United States,* 174 *U. S.* 47, 55;

Coffin v. *United States,* 156 *U. S.* 432, 458.

In the *Coffin* case this Court said, by the present Chief Justice:

> "Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to over-

come the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn. * * *

The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.

Concluding, then, that the presumption of innocence is evidence in favor of the accused introduced by the law in his behalf, let us consider what is 'reasonable doubt.' It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. * * *

The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views, and indicates the necessity of enforcing the one, in order that the other may continue to exist. Whilst Rome and the Mediaevalists taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis. The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that

the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime. The importance of the distinction between the two is peculiarly emphasized here, for, after having declined to instruct the jury as to the presumption of innocence, the court said: 'If after weighing all the proofs and looking only to the proofs, you impartially and honestly entertain the belief', etc. Whether thus confining them to 'the proofs' and only to the proofs would have been error if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. 'The proofs and the proofs only' confined them to those matters which were admitted to their consideration by the court, and among these elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him."

(Coffin v. U. S., 156 U. S., pp. 458-461).

It is also to be noted that while the courts below went outside of the record properly before them for evidence which was regarded as damaging to the accused, they ignored everything in his favor, and particularly the statement of the Justice of the Peace that after a careful examination of Alcanzaren's body, three days after the assault, he "failed to find any contusion of a serious character, but only such as might be cured without medical assistance in less than seven days" (Rec. p. 22), and the striking corroboration of this conclu-

sion by the physician who performed the autopsy, that his examination failed "to show any connection between the death of the said party and any bodily injuries received by him. There were, however, strong indications that death was due to a disease of an infectious nature." (Rec. p. 19 and see also pp. 5, 6).

All this the Courts below disregarded, and upon the testimony of another physician, who never saw the deceased, that certain injuries, assumed but never proved, might possibly, but probably would not, have caused death twenty-six days later, convicted the defendant of homicide, and sentenced him to fourteen years' imprisonment. Thus the possible improbability of the second physician despite the "strong indications" found by the first that death was due to a disease of an "infectious nature" was sufficient to overcome the presumption of innocence. Conviction by improbability works a new juristic epoch.

So far from there being any evidence, competent or otherwise, legitimately tending to prove the defendant guilty beyond a reasonable doubt, there is, upon the record, no reasonable doubt that he was innocent of Alcanzaren's death.

Irrespective of exceptions taken upon the trial, the Philippine Supreme Court had full power of review, and was required by statute to render "such judgment as law and justice shall dictate."

(See Phil. Comp. Stat. § 3305).

We respectfully submit that in this case the Court below has done neither, and that its judgment violating law also denies justice.

Conclusion.

The judgments of both courts below should be reversed, the conviction set aside and the defendant discharged from further prosecution.

Respectfully submitted this 10th day of November, 1911.

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Appendix.

Philippine Statutes in regard to presumptions in civil cases.

(Phil. Comp. Stat. §§2764, 2765.)

Sec. 2764. *Conclusive presumptions.*—The following presumptions or deductions, which the law expressly directs to be made from particular facts, are deemed conclusive:

(a) Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he can not, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;

(b) The tenant is not permitted to deny the title of his landlord at the time of the commencemen of the relation of landlord and tenant between them;

(c) The issue of a wife cohabitating with her husband, who is not impotent, is indisputably presumed to be legitimate, if not born within the one hundred and eighty days immediately succeeding the marriage or after the expiration of three hundred days following its dissolution;

(d) The judgment or order of a court, when declared by this title to be conclusive;

Sec. 2765. *Disputable presumptions.*—The following presumptions are satisfactory, if uncontradicted, but they are disputable, and may be contradicted by other evidence.

(a) That a person is innocent of crime or wrong;

(b) That an unlawful act was done with an unlawful intent;

(c) That a person intends the ordinary consequence of his voluntary act;

(d) That a person takes ordinary care of his own concerns;

(e) That evidence willfully suppressed would be adverse if produced;

(f) That money paid by one to another was due to the latter;

(g) That a thing delivered by one to another belonged to the latter;

(h) That an obligation delivered up to the debtor has been paid;

(i) That former rent or installments had been paid when a receipt for the later ones is produced;

(j) That things which a person possesses are owned by him;

(k) That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership;

(l) That a person in possession of an order on himself for payment of money, or the delivery of anything, has paid the money or delivered the thing accordingly;

(m) That a person acting in a public office was regularly appointed or elected to it;

(n) That official duty has been regularly performed;

(o) That a court, or judge acting as such, whether in the Philippine Islands or elsewhere, was acting in the lawful exercise of his jurisdiction;

(p) That all the matters within an issue in an action were laid before the court and passed upon by it; and in like manner that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;

(q) That private transactions have been fair and regular;

(r) That the ordinary course of business has been followed;

(s) That a promissory note or bill of exchange was given or indorsed for a sufficient consideration;

(t) That an indorsement of a negotiable promissory note or bill of exchange was made after the time and at the place of making the note or bill;

(u) That a writing is duly dated;

(v) That a letter duly directed and mailed was received in the regular course of the mail;

(w) Identity of person from identity of name;

(x) That a person not heard from in seven years is dead;

(y) That acquiescence resulted from a belief that the thing acquiesced in was conformable to the law or fact;

(z) That things have happened according to the ordinary course of nature and the ordinary habits of life;

(aa) That persons acting as copartners have entered into a contract of copartnership;

(bb) That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

(cc) That child born in lawful wedlock, there being no divorce, absolute or from bed and board, is legitimate;

(dd) That a thing once proved to exist continues as long as is usual with things of that nature;

(ee) That the law has been obeyed;

(ff) That a document or writing more than thirty years old is genuine, when the same has since been generally acted upon as genuine by persons having an interest in the question, and its custody has been satisfactorily explained;

(gg) That a printed or published book, purporting to be printed or published by public authority, was so printed or published;

(hh) That a printed or published book, purporting to contain reports of cases adjudged in tribunals of the State or country where the book is published, contains correct reports of such cases;

(ii) That a trustee or other person whose duty it was to convey real property to a particular person has actually conveyed to him when such presumption is necessary to perfect the title of such person or his successor in interest;

(jj) That there was a good and sufficient consideration for a written contract;

(kk) When two persons perish in the same calamity, such as wreck, battle, or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, the survivorship is presumed from the probabilities resulting from the strength and age of the sexes, according to the following rules:

1. If both those who have perished were under the age of fifteen years, the older is presumed to have survived

2. If both were above the age of sixty, the younger is presumed to have survived;

3. If one be under fifteen and the other above sixty, the former is presumed to have survived;

4. If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older;

5. If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

GABRIEL DIAZ, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No 384.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Gabriel Diaz stands convicted by the Supreme Court of the Philippine Islands of the crime of homicide, and sentenced therefor to the penalty of 14 years of *reclusión temporal,* with the accessory penalties of article 59 of the Penal Code, to indemnify the heirs of the deceased in the sum of ₱1,000, and to pay costs. (R., 53.)

He brings that judgment here for review by writ of error.

On the 31st day of May, 1906, Maria Condeno filed a charge against Diaz before Pelagio Carbajosa, justice of the peace of San Carlos, in the Province of Occidental Negros, accusing Diaz of

the crime of assault and battery, committed on the 30th day of May, 1906, upon her son-in-law, Cornelio Alcanzaren, inflicting upon him serious injuries and leaving him in a dying condition as the result of such injuries. (R., 20.)

Diaz was arrested upon this charge and a trial had, at which he was present, and testified in his own behalf to the effect that he had merely slapped Alcanzaren in the face several times. As a result of this trial he was on the 4th of June found guilty of a misdemeanor, "as per his own admission," and was accordingly sentenced to pay a fine of 50 pesetas, Philippine currency, in accordance with paragraph 1, section 589 of the Penal Code, and the costs of prosecution. (R., 20, 22.)

On the 27th day of June, 1906, Maria Condeno again appeared before Carbajosa, justice of the peace, and made information before him under oath that her son-in-law, Alcanzaren, had died on the afternoon of the 26th day of June as the result of the ill treatment suffered by him at the hands of Gabriel Diaz. Complaint was then made out in due form by her, accusing Diaz of the crime of homicide, committed on the 30th of May, 1906, by threatening with physical violence Alcanzaren, the son-in-law of the informant, and charging that as a result of the blows delivered by the accused against the said Alcanzaren and kicks received by the latter on various parts of his body he died on the 26th of June at 5 o'clock. (R., 1, 2.)

Carbajosa, as justice of the peace, instituted a preliminary investigation (R., 3), found Diaz guilty as charged, and forwarded the record of the proceedings to the provincial fiscal of the Province of Occidental Negros for action. (R., 23.)

Thereafter, on the 5th day of September, 1906, Manuel Blanco, provincial fiscal, charged Diaz with the crime of homicide in the Court of First Instance, in the Province of Occidental Negros, as follows (R., 24):

> That the said accused, Gabriel Diaz, did on the 30th of May, 1906, assault and beat Cornelio Alcanzaren and that as the result thereof the latter died on the 26th of June last at the hacienda of Sugbongcogon, within the jurisdiction of the said municipality of San Carlos, in violation of the statute in such cases made and provided.

To this accusation Diaz filed a plea of former jeopardy, in which he recited that he was accused of having beaten Alcanzaren, who died 28 days later as the result of said beating, and that for this he had been prosecuted, tried, and convicted in the court of the justice of the peace of San Carlos, of this Province, the judgment rendered by the justice of the peace having been duly executed, and so having been already tried and convicted upon the complaint filed by the provincial fiscal in the court of the justice of the peace, such conviction, under section 28 of General Order 58, was a bar to further prosecution for the same crime. (R., 25.)

This "judgment rendered by the Justice of the Peace of San Carlos and the execution of the same," he says, appear " at the end of the preliminary investigation which counsel for Gabriel Diaz now adduces as prima facie evidence in these proceedings." (R., 25.)

This plea was overruled and exception saved to the ruling of the court. (R., 26, 27.)

The case came on for trial without a jury in the Court of First Instance of Occidental Negros on the 15th day of August, 1907, and proceeded from time to time until September 21, 1907. (R., 28, 29.)

The court took the case under advisement and rendered its judgment on December 24, 1907, again overruling the defense of former jeopardy, and finding the defendant guilty of the crime of homicide, with extenuating circumstances under numbers 3 and 4 of the Penal Code, sentenced him to the penalty of six years and one day of imprisonment, with the accessories provided by law, and to indemnify the heirs of Cornelio Alcanzaren in the sum of 1,000 pesos and costs. (R., 45–48.)

Diaz appealed to the Supreme Court of the Philippine Islands. This court overruled the contentions of the accused, and, taking a more serious view of the case even than that taken by the Court of First Instance, and finding that the only mitigation was circumstance 3, article 9 of the Penal Code, namely, that the accused did not intend the death of Alcanzaren, reversed the judgment of the Court

of First Instance, and sentenced Diaz, as before stated, to 14 years of *reclusión temporal,* with the accessory penalties. (R., 53.)

To the complaint in the Court of First Instance, Diaz, by counsel, filed his plea of former jeopardy on September 21, 1906. It was overruled on the 26th of the same month. The case was set to be tried on the 17th of December, and subpœnas for the Government's witnesses were issued on November 26. None of the witnesses were served, they being reported absent in the island of Panay. (R., 25, 27.)

The mother-in-law, who had been so active in instituting the prosecution against Diaz, was not subpœnaed nor mentioned as a witness, and neither was any person who had been an eyewitness of the assault.

Diaz on December 17 moved to dismiss the case because the witnesses for the prosecution had failed to appear. This was denied and the case continued to January, 1907. On January 23, 1907, counsel for Diaz asked for an order for the arrest of the Government witnesses, to which the fiscal objected because they had not been served with subpœnas, they being still absent in Panay. (R., 28.)

In July, Diaz asked for a continuance of the trial to August 15, to enable him to secure the attendance of witnesses. On that day the case was called for trial, the court sitting without a jury. Matias and Tomas Ferrer were present and testified. An order for the arrest of Biarro, Francisco, and

Lachica, the remaining witnesses in the Government list, was issued at the request of the fiscal. (R., 28, 29.)

Matias Ferrer testified that he knew Alcanzaren; he died in June, 1906; the cause of his death was not known to the witness, but somebody had told him that he had died as a result of the ill treatment he had received at the hacienda where he lived, known as Sugbongcogon; he knew Diaz, and Diaz, in May, 1906, was employed in the hacienda of Ramon Lopez; Alcanzaren came to the hacienda Sugbongcogon before the month of June was up; he was apparently in good health and was looking for work; witness asked him to fix his fishing net, and he worked on that three days. Alcanzaren was taken sick after that; with what witness does not know. He was sick about a week before he died. (R., 30, 31.)

Tomas Ferrer testified that he knew Diaz and Alcanzaren. The latter lived with the Ferrers and worked in the same hacienda fixing the fishing net. He remained there about a month; is now dead. Witness did not know whether or not he was sick while working on the net. (R., 32.)

There being no more witnesses at hand, the case was continued to August 29, 1907, when the trial was resumed.

Santos Priano testified that he knew Alcanzaren and saw him when he was living with Matias Ferrer; Alcanzaren is now dead; witness helped to bury him; did not know cause of death, and did not

know whether there had been any quarrel or fight between Alcanzaren and Diaz. He had testified before the justice of the peace, but did not remember what he said there. His testimony was then read to him. His statement as contained in the record that he knew Diaz and Maria Condeno was true. His statement also was true that Alcanzaren told him that if he died at all it would be as the result of the blows received by him, but Alcanzaren said this before he was taken sick, four weeks before he died. His statement that Alcanzaren was suffering from pains near the navel as a result of the injuries inflicted upon him by Diaz was but repeating what Alcanzaren told him, for he did not know what disease he was suffering from. As to the statement that he never noticed that Alcanzaren was suffering from any disease, or that he had any trouble other than that stated before, it was true. His statement that he knew very well that Diaz was the person actually responsible for the injuries inflicted upon the deceased was simply repeating what Fabian's cousin had told him; he did not see it himself. He did not know how long Alcanzaren was sick; he was confined four weeks at the cuartel. During this time witness met him a few times on the road walking at night; did not know that he was sick; he walked as though nothing was the matter with him. Witness helped to bury Alcanzaren. (R., 33, 34.)

Estanislao Francisco testified that he knew Diaz and Alcanzaren; the latter because he used to go to

the beach for a walk and call at the house of Matias Ferrer. This was at the hacienda Sugbongcogon. In May and June, 1906, witness was living in Iloilo; does not remember in what year he worked at the hacienda Sugbongcogon; stopped working there about two years before time of testifying; was a witness in the justice court; does not know who was justice, who was present, or the matter as to which he testified. His testimony before the justice was read to him, and he ratified the answer to the first question, which was that he knew Diaz and Alcanzaren; and as to the remaining questions he " did not testify what it says there." (R., 35, 36.) This remainder of his testimony was that he knew that Alcanzaren died as the result of the injuries inflicted upon him by Diaz; remembered, but not the date, that Alcanzaren removed to the house of Aragon in the hacienda of San Jose; did not see him do any work or engage in any particular occupation during that time; he was suffering from pains in the neck, in the right side, and near the navel, and died as the result of such pains. (R., 13.)

The trial was continued at the request of the fiscal, that he might get the justice of the peace and Fabian Aragon. The last named was an eyewitness to the assault, but his attendance was not secured. The trial was resumed on September 20, 1907. (R., 36.) The accused waived his right to be present at the examination of Government witnesses. (R., 29.)

Pelagio Carbajosa, the justice of the peace, identified the testimony given by Priano and Francisco, as contained in the record of the preliminary investigation, and stated that they testified as recorded. (R., 36, 37.)

On cross-examination: The witnesses were sworn in Spanish and in the Visayan dialect. He remembered trying the accused on a complaint for misdemeanor based upon the same facts which were the subject of this preliminary investigation and sentenced him to pay a fine, which he did pay; tried him for assault and battery because Alcanzaren came to him and told him he had been assaulted by Diaz; did not remember asking him whether he wanted to be treated by a physician; thought his injuries did not require medical treatment because his mother-in-law said she would take care of him. He identified the signature of Dr. Suarez to the doctor's certificate, as follows (R., 38):

> Q. Look at this signature and state whose it is and who made this examination?
>
> A. This examination was made after the man's death, when the post-morten examination was made.
>
> Q. I only want to know——
>
> A. Yes, I know, that is the signature of Dr. Suarez who examined the body of the deceased.
>
> Q. This then is the doctor's certificate, is it not?
>
> A. Yes.
>
> Q. That's all.

The court then took the witness in hand, and he testified:

The accused when he pleaded guilty to the misdemeanor admitted that he had inflicted the injuries upon Alcanzaren. Some twenty days after he decided the case Alcanzaren died. He saw the injuries; some were on the neck and some on the navel. Those on the neck were slight, no abrasion or wound. The contusions on the navel were swollen. The inflammation of the navel was about eight centimeters in length and had a rectangular shape. The inflammation was very prominent. Alcanzaren's complexion was brown. The accused only admitted having beaten Alcanzaren in the face with the open hand. The deceased said the contusion on the navel was caused by a kick which the accused gave him. Diaz denied having struck Alcanzaren in the navel. In the case tried before him he made an investigation, the result of which showed that Gabriel Diaz was the party who inflicted the contusions on the navel. (R., 38, 39.)

On cross-examination by counsel for defendant he said (R., 39, 40):

In the misdemeanor case Diaz testified in his own behalf. He considered the act of the accused as a misdemeanor, because the injuries were apparently slight. Not being an expert, he could not express an opinion as to how long it would have taken the injured party to recover from the effects of the blows.

To the fiscal he answered that the deceased was almost as tall as the accused.

The court took the witness in hand again, and he said (R., 40):

He tried the accused for a misdemeanor, although he was unable to determine how long it would take the injured party to recover from the effect of the blows, because the deceased himself said that the injuries were slight and required no medical treatment, and he saw that they were slight, and therefore tried the case. He did not know that considering the tenderness of that part of the human body the contusion in the navel might be more or less serious.

And here the fiscal announced: "The prosecution now rests." (R., 40.)

The proceedings on the part of the defense were as follows (R. 40):

> COUNSEL FOR THE DEFENDANT: I now offer in evidence the record of the proceedings in the case for a misdemeanor, which is the only proof, and that's all.

At the request of the prosecution, and for the purpose of introducing evidence in rebuttal, the hearing of the case was adjourned *sine die,* but was resumed the next day, when the prosecution introduced as an expert witness a physician, Jose Hilado, who testified:

A blow on the navel with a hard instrument eight centimeters square might affect, if in the navel itself, the intestines; if a little above, the stomach;

and, if below, the bladder if that was charged with urine. The effect would be in proportion to the blow. If a person is mauled in the navel, as with a shoe, and that part becomes inflamed, it may affect the internal organs. A person thus injured might easily recover if properly treated, if the injury extends to the abdominal region only, particularly if death does not immediately follow the blow. If the patient does not receive proper treatment death would not be a necessary consequence, but then he might die. If death did not follow at once upon the blow it would not follow at all unless the intestines, stomach, or some other organ, particularly the peritoneum, should become inflamed. This, if it existed, could not have been overlooked by the persons who attended the patient. The inflammation should occur a few days after the blow and disappear in the course of a week or two. A person thus injured could live more than two weeks after the blow, if he was to recover at all, provided the complication which would follow gradually improved; otherwise he would hardly live two weeks. He might live twenty-six days, but he thinks that would be too long. After the complication occurred the person could not work. The post-mortem examination disclosed no injury of the internal organs to which he referred. Such an injury would be very difficult to detect on a post-mortem made two days after death, because the aspect of the tissues changes greatly. A blow on the neck with a hard instru-

ment, if in the center, may rupture the trachea, if in the side would not be serious, and on the back of the neck might cause instant death. A contusion on the navel like that described may indicate injury of the internal organs, but not if death did not occur until twenty-six days later and the party was able to work during that time. Twenty-six days was an unreasonable time, and it is not likely that death should have occurred as the result of the blows, but it might be. The time of death in such cases is not absolutely certain. The physical condition of the person has much to do with it. A farm laborer can resist some forms of disease better than people of sedentary habits, but he would be more subject to inflammation. There are no absolute theories in medicine. It all depends upon the idiosyncrasy of the individual. It is very possible that a person suffering from injuries such as described might die within a week, two weeks, or perhaps a month. (R., 40–43.)

To the counsel for the defendant he answered that he could not state whether or not there is any substance which when applied to the skin produces the same effect as a blow. A discussion with the court on this subject follows, and it all concludes with an answer to counsel for the defendant that there are certain substances which when applied to the skin produce effects of a similar aspect as those of a blow, without causing blisters on the skin. (R., 43, 44.)

Now, again, the fiscal announces: " The prosecution rests."

The counsel for defendant announced that he must ask the defendant whether he is willing the defense should rest. Later, the same day, he said he had no further evidence to introduce, and so rested. (R., 45.)

The case was then argued and taken under consideration by the court and decided on December 24, 1907, as before stated.

It is to be observed that there was no objection, on either side, to any testimony offered and no suggestion of qualifying or limiting the effect of any testimony or the purpose for which it was introduced.

It is apparent from this record, as the Supreme Court of the Philippine Islands said, that the provincial fiscal was obstructed in the prosecution of the case. He had great difficulty in securing the attendance of witnesses, and failed entirely as to some of them. Fabian Aragon was subpœnaed, but did not attend. Priano and Francisco, especially the latter, had a marked change of memory after the preliminary investigation, and after that investigation the mother-in-law, Maria Condeno, and other eyewitnesses to the assault, are not heard of again.

The conviction of Diaz, however, was not based by either the Court of First Instance or the Supreme Court entirely upon the testimony of the witnesses produced at the trial.

The Court of First Instance considered, in addition, the record of the trial for assault and battery and of the preliminary investigation. The opinion of the court deals with both records, as will be seen by reference to page 46 of the record.

The Supreme Court in terms declares both records, under the circumstances of their introduction, to be competent substantive evidence of the facts which they narrate. As to this the court said (R., 51):

> The defense, in order to prevent the prosecution and trial of the case, pleaded that the accused had already been placed in jeopardy, having been tried, convicted, and condemned to pay a fine of 50 pesetas and costs by the judgment rendered by the justice of the peace of San Carlos in the action brought for maltreatment, and as *prima facie* evidence presented the record of the preliminary investigation, at the foot of which the proceedings had in said trial for misdemeanor appear (folio 45).
>
> As the above plea was overruled, the accused only offered as evidence at the trial a certified copy of the proceedings at the trial for misdemeanor, which appears attached to the record of the preliminary investigation at folios 36–40, forwarded by the aforesaid justice of the peace to the provincial fiscal of Occidental Negros in view of the fact that the accused had committed the crime of homicide, and it was the duty of the latter official to have produced the same

in the Court of First Instance upon the filing of his complaint for the said crime.

Therefore, the record of the preliminary investigation and the proceedings in the trial for misdemeanor were offered in the present case by the defense as evidence that the accused had already been in jeopardy, and subsequently, at the close of the trial, the defense again presented them as such evidence. In view of the repeated presentation of the record of said trial, it was not necessary for the provincial fiscal to offer the said proceedings for a third time as evidence for the prosecution, and he is entitled to avail himself of them to prove the crime and the guilt of the principal, inasmuch as it is a rule of law that a document presented in evidence by one party may likewise be used by the adverse party as evidence for his cause of action.

Accepting these records, as the court did, they, with the testimony of the witnesses, establish the guilt of the accused.

The record of the trial for assault and battery has much that is material. Two policemen report Alcanzaren on June 1 as confined to his bed and in a critical condition as the result of the ill treatment by Diaz. The justice of the peace himself went out to the house, " and finding him in a critical condition " took his deposition, and in this Alcanzaren testified to the brutality of the assault, and that as a consequence he was suffering severe pains. The justice examined Alcanzaren and found him on the

1st of June suffering from a dislocated thumb, a swelling about the navel, a scratch on the right breast, a scratch on the neck, and a contusion in the face, the contusions about the navel and on the breast apparently serious. (R., 20, 21.) The next day Alcanzaren appeared in court, and upon examination the justice "failed to find any contusions of a serious character but only such as might be cured without medical assistance in less than seven days." (R., 22.) The information promptly filed by Maria Condeno charged the wounds to be very serious, and this was read to Diaz. The defendant admitted having slapped Alcanzaren in the face two or three times "for being disrespectful to him." Alcanzaren gives as the reason for the assault that having gone to confessional the day before he informed Diaz that he would not report for work on this day.

Diaz was at his request furnished a copy of this record at the preliminary investigation. He adduced it in support of his special plea of former jeopardy. He offered it in evidence at the trial in the Court of First Instance, and he offered it without limitation or qualification as to purpose or effect. He relies now upon it to show the identity of the assault for which he was fined with that for which he was prosecuted on the charge of homicide.

As to the record of the preliminary investigation: This contained within itself, as a part of the preliminary investigation, the record of the trial for

assault and battery. There was but one document, and this document in its entirety was treated by both parties as in evidence at the trial in the Court of First Instance.

The preliminary investigation was instituted by the mother-in-law, Maria Condeno, on the 27th of June, by a charge which alleged the death of Alcanzaren on the day before, at 5 o'clock p. m. (R., 2.) Diaz was at once arrested, informed of the charge, and pleaded not guilty. (R., 3.) He asked " that for the purpose of establishing the actual facts connected with the death of the said Cornelio Alcanzaren, in which the undersigned (Diaz) had no participation, an order be issued directing that the doctor of this town, Luis Suarez, make a post-mortem examination of the body of the deceased, *your petitioner promising to defray all necessary expenses which may be incurred in connection therewith.*" (R., 5.)

An examination without an autopsy was had at once, lay witnesses thereto reporting " that the whole neck of the deceased was discolored, that the body exhibited a black spot on the right upper region of the abdomen and several black spots on the lower regions of the same." (R., 5.)

Doctor Suarez reported that from this external examination it appears (R., 5–6):

> First. That the body of the deceased was in an advanced stage of decomposition, the abdomen being very much swollen and this

part of the body considerably discolored; also the lower limbs.

Second. That this discoloration is more noticeable near the neck, on the back of which there is an erosion about the size of a twenty cent piece (peseta).

Third. That on the upper right side of the abdominal region the body showed a black spot, circular in shape, apparently caused by a limited contusion (something strange, it being on a soft part of the body) *or by the application of some caustic substance.*

Fourth. That as far as could be ascertained by feeling the body, there was no injury affecting the osseous system.

Fifth. That there was no sign of the retention of the urine in the bladder.

Sixth. That from the aforesaid symptoms and external signs, it is impossible to arrive at any definite conclusion as to the cause of the death of the deceased, Eusebio Alcanzaren.

After some objection, Dr. Suarez, on the 28th of June, performed an autopsy, with the following result, as reported by lay witnesses on the same day (R., 8–9):

> The whole neck was black and the physician ordered that the body be opened by a longitudinal cut starting at a point immediately below the throat, and black blood issued from the right side; the abdomen was also opened and the bladder was apparently black, and the whole stomach also seemed

to be discolored; the kidneys, the liver and the spleen absolutely black, and finally there was a black trail through the abdomen on the right side. The muscles were apparently in a normal condition but the flesh naturally was in a decaying condition.

Witnesses were then called and examined.

Crisanto Periano testified that Alcanzaren was "suffering very much physically as the result of the punishment inflicted upon him." In view of his critical condition his mother-in-law and her brother, Fabian Aragon, took him to Aragon's house, where he died. He did not observe that Alcanzaren was suffering from any disease or had any other trouble than that stated. (R., 12, 13.)

Estanislao Francisco did not see Alcanzaren engage in any work after the assault. "He was suffering from pains in the neck, in the right side and near the navel, having since died as the result of such pains." (R., 13.)

Nemesio Balcena was a brother-in-law of the deceased. Alcanzaren died as the result of the injuries inflicted upon him by Diaz. The deceased, some time before he died, said to the witness: "'Manong (brother) I now entrust to you and to brother Fabian my wife, because I see that I am going to die as the result of the injuries I received from Gabriel Diaz.'" Witness did not see Alcanzaren work. He called on Matias Ferrer for some light work, and Ferrer told him he could work on the fishing net. (R., 14.)

Fabian Aragon was a witness to the assault, and says he knows that Alcanzaren died as a result of the injuries inflicted by Diaz, because he was present when Diaz threatened the deceased with bodily injury. And, further, he said (R., 15):

> I swear that Cornelio died as a result of the injuries because he was not suffering from any disease, and, further, because on one Sunday in the month of June last, I do not remember the date, I went to the house of Matias Ferrer on the beach of the hacienda of San Jose to get the deceased, Cornelio Alcanzaren, who was already suffering from pains in the neck, in the right side of the abdomen and near the navel, and took him to my own house in the same hacienda to render such assistance as I could, and two days later he died as a result of the injuries. He told me before he died that he could no longer resist the pain and that he would probably die before dawn as a result of the beating received from Gabriel Diaz, and then entrusted his wife to me to take care of her after his death. This is what the deceased, Cornelio Alcanzaren, said to me.

On cross-examination Aragon said he was first cousin to the deceased. He did not see him do any work after he was beaten by Gabriel Diaz until his death.

Paulino Lachia testified (R., 16):

> Q. Do you know the defendant, Gabriel Diaz, and the deceased, Cornelio Alcanzaren?

A. I know the defendant, Gabriel Diaz, also the deceased, Alcanzaren.

Q. Do you know whether Cornelio Alcanzaren died as a result of the injuries inflicted upon him by the defendant, Gabriel Diaz?

A. I know that he died as a result of the beating received from Gabriel Diaz.

Q. Why do you say that Alcanzaren died as a result of the injuries inflicted upon him by Gabriel Diaz?

A. I know that his death was brought about as a result of the ill treatment received by him at the hands of Gabriel Diaz for the reason that he was not then suffering from any disease except the beating.

Q. Did you ever see the deceased, Cornelio Alcanzaren, engage in any heavy work?

A. I never saw him do any work at all after he was threatened.

Diaz was present throughout the examination and attested the record of the testimony of the witnesses with his signature.

Diaz himself testified as follows (R., 18):

Q. Do you know whether Cornelio Alcanzaren, the son-in-law of the complaining witness, died as a result of the ill treatment received from you?

A. I do not think so. He deserted from the hacienda after this court rendered judgment in the case for assault and battery instituted against me, and I did not see him again until his body was brought into this

court as a result of the complaint filed by Maria Condeno.

Q. Do you have anything further to say in connection with this matter?

A. I have nothing to say but simply repeat what I stated in my testimony in the proceedings instituted in this court on the 31st of May last.

Q. Do you have anything to add to or suppress from your statement?

A. I do not.

Dr. Suarez, who performed the autopsy on Alcanzaren, withheld his report of it although three times urged to present it. On the 9th of July he was notified that if he did not present it he would be dealt with in accordance with law. He thereupon submitted the following (R., 19):

"*To the Municipal Judge of San Carlos.*

SIR: In reply to your kind communication dated to-day, relative to the result of the post-mortem examination held upon the body of the deceased Cornelio Alcanzaren, I have the honor to inform you that the examination made by me fails to show any connection between the death of the said party and any bodily injuries received by him. There were, however, strong indications that death was due to a disease of an infectious nature. This is all that I have to state to you as the substance of the post-mortem examination to which you refer.

Respectfully,

(Signed) L. G. SUAREZ."

The doctor was also requested by the magistrate to appear "before this court as soon as possible for the purpose of giving your testimony in the proceedings which are now being instituted against Gabriel Diaz for the crime of homicide," but to this he gave no attention. (R., 19.)

In this court Diaz makes the following assignment of errors (R., 55, 56):

> 1. The Court has committed error in concluding that the proofs are sufficient to convict the accused of the offence charged.
>
> 2. The Court has committed error in declaring improper the objection that the accused has been placed in jeopardy twice for a single act.
>
> 3. The Court has committed error in holding that the copy of the proceedings and trial in the Court of the Justice of the Peace offered in support of the objection of jeopardy is competent to prove the guilt of the accused in this cause.
>
> 4. The Court has committed error in holding as competent proof of the guilt of the accused a copy of the testimony of witnesses given on another occasion in another cause before another tribunal and not in the presence of the accused.
>
> 5. The Court has committed error in holding that the Court of First Instance of Occidental Negros had jurisdiction of the subject matter of this cause.

6. The Court has committed error in holding that the mistreatment received by the deceased was the cause of his death.

7. The Court has committed error in holding that it was incumbent upon the accused to demonstrate and prove that the cause of the death of the deceased was a cause distinct and independent of the mistreatment received by him.

8. The Court has committed error in holding that the trial misdemeanor, wherein the accused has been tried, convicted and condemned, was a fraudulent act on the part of the accused.

9. The Court has committed error in holding that the accused has incurred the responsibility provided in Article 404 of the Penal Code.

10. The Court has committed error in not dismissing this cause.

11. The Court has committed error in refusing to acquit the accused in this cause.

12. The Court has committed error in sentencing the accused to the penalty of 14 years of imprisonment, the accessory penalties provided in Article 59 of the Penal Code, the payment of an indemnity of ₱1,000 to the heirs of the deceased, and to the payment of the costs in both instances.

POINTS AND AUTHORITIES.

I.

The jurisdiction of this court under the writ of error is restricted to the question, whether any rights of the defendant secured by the Constitution or statutes of the United States have been violated.

Ong Chang Wing v. *United States,* 218 U. S. 272;
Dowdell v. *United States,* 221 U. S. 325.

II.

The conviction upon the prosecution for assault and battery was not a bar to the prosecution for the homicide resulting from the assault.

Grafton v. *United States,* 206 U. S. 333;
Commonwealth v. *Roby,* 12 Pick. (Mass.) 496;
State v. *Littlefield,* 70 Me. 452;
Johnson v. *State,* 19 Tex. Appeals, 453;
Bishop's New Crim. Law, vol. 1, sec. 1059.

III.

The right of the defendant to be confronted by the witnesses against him was not violated, for the record of the preliminary investigation was in evidence by his act and with his consent, for every purpose to which it was relevant.

Hancock v. *State,* 14 Tex. Appeals, 392;
Rosenbaum v. *State,* 33 Ala. 354;
State v. *Fooks,* 65 Iowa, 452;

Williams v. *State,* 61 Wis. 281;
Reynolds v. *United States,* 98 U. S. 145;
Ansbro v. *United States,* 159 U. S. 695;
West v. *Louisiana,* 194 U. S. 258;
Paraiso v. *United States,* 207 U. S. 368;
Weems v. *United States,* 217 U. S. 349;
Dowdell v. *United States,* 221 U. S. 325.

ARGUMENT.

I.

The case in this court is not subject to review generally. Section 10 of the act of July 1, 1902, providing for a civil government in the Philippine Islands, limits the review in criminal cases to those "in which the Constitution or any statute * * * of the United States is involved." *Ong Chang Wing* v. *United States,* 218 U. S. 272.

To the same general effect is *Dowdell* v. *United States,* 221 U. S. 325, 328.

This eliminates all the assignments of error which are in the nature of general complaints of the action of the Philippine courts and restricts consideration to the plea of former jeopardy and the use made of the record of the preliminary investigation and trial for assault and battery.

The objection to the jurisdiction of the Court of First Instance presents no question under the Constitution or statutes of the United States, but only of the sufficiency of the proof of venue. The objection, moreover, is without merit. The assault was committed at the hacienda of San Antonio, in the

barrio of Guadalupe, and this description disclosed to the justice of the peace of the municipality of San Carlos, when he tried the defendant for the assault, whether or not it was within his jurisdiction, as a barrio is one of the districts or wards into which a municipality is divided. All the testimony in the case and all the transactions and proceedings deal with the assault and the death of Alcanzaren as having occurred in the immediate vicinity of the place of trial. The justice of the peace found formally that he had jurisdiction of the case, and Diaz admitted the jurisdiction by his plea of guilty and asserted it in the present case by his plea of former jeopardy. It is enough, however, to say that the technical sufficiency of the evidence of venue involves no right of the defendant secured by the Constitution or statutes of the United States.

II.

The plea of former jeopardy was properly overruled. The defendant made a brutal assault upon Alcanzaren. Complaint was made of it at once and before the deadly nature of the assault had disclosed itself. To this charge of assault the defendant pleaded guilty, was fined, and paid the fine. Within a month the victim of the assault died, as a consequence of injuries inflicted by the assault. Now the offense of the defendant was complete and proved itself to be homicide. Now, and not until now, was he subject to the charge; now, and not until now, could he be placed in jeopardy as to this

offense. And of this offense the justice of the peace before whom he was tried and by whom he was convicted of the assault had no jurisdiction except to make a preliminary investigation. In the judgment of conviction of assault rendered by the justice of the peace every possible element essential to constitute jeopardy of the charge of homicide was wanting—the offense, the charge, the jurisdiction of the court to try the charge, trial or pretense of trial upon it, and judgment, or possibility of judgment either of acquittal or conviction.

The justice of the peace had no jurisdiction to try the defendant for manslaughter. Sec. 68 of Act No. 136 of the Acts of the Philippine Commission. In *Grafton* v. *United States,* 206 U. S. 333, 345, this court said:

> We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged.

The impolicy of permitting a conviction of assault before the death of the victim to stand as a bar against prosecution for the homicide, and the travesty upon justice resulting from it, are too obvious for discussion.

Bishop, dealing with the question in his New Criminal Law, vol. 1, sec. 1059, says:

> If within a year and a day after a battery the injured person dies, the offence becomes

> a felonious homicide. Then, though there should have been an intermediate conviction for assault and battery, there may be a prosecution for the homicide; not, it appears, because the battery is the less offence, but because the blow which had not produced death is, when viewed in the light of its results, a thing different from the blow which had produced death.

In *Com.* v. *Roby,* 12 Pick. (Mass.) 496, l. c. 505, Chief Justice Shaw held that a conviction upon an indictment for assault with intent to commit murder could not be pleaded in bar to an indictment for murder. He said:

> The indictment for murder necessarily charges the fact of killing, as the essential and most material fact, which gives its legal character to the offence. If the party assaulted, after a felonious assault, dies within the year and day, the same act, which till the death was an assault and misdemeanor only, though aggravated, is by that event shown to have been a mortal wound. The event, strictly speaking, does not change the character of the act, but it relates back to the time of the assault, and the same act, which might be a felonious assault only, had the party not died, is in truth shown by that event to have been a mortal wound, and the crime, which would otherwise have been an aggravated misdemeanor, is thus shown to be a capital felony. The facts are essentially different, and the legal character of the crime essentially different.

In *State* v. *Littlefield,* 70 Me. 452, 457, 459, the court states the question before it as follows:

> The precise question presented is, whether the conviction of the defendant, before the municipal court of Lewiston, on the fourth day of March, of simple assault and battery, for the same battery of which Morton died, on the twenty-third day of March, is a bar to the indictment for manslaughter (p. 457).

It answers the question in these words:

> At the time of the first prosecution and conviction the defendant had not committed the crime with which he is now charged. True the force had been inflicted upon the body of Morton, but his death had not ensued. The force was acting to produce its effect, and the defendant was as much responsible for its natural and necessary result as if he had all the while been pressing it upon the body of his victim. When death was caused by that force a new and distinct crime was consummated by the defendant, of which he was not before guilty, and for which he could not have been convicted at the time of the first prosecution. The offenses are not the same in fact, and therefore are not identical (p. 459).

In *Johnson* v. *The State,* 19 Tex. App. 453, 461, where the same question was involved, the Court of Appeals of Texas said:

> There never can be the crime of murder or manslaughter until the party assaulted dies; these crimes have no existence in fact

or law till such death. It cannot, therefore, be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder or manslaughter after the death, of the injured party. The death of the assaulted party creates a new crime. At the time the defendant was convicted of the assault and battery upon Davis, the court in which such conviction was had did not have jurisdiction of the offense here prosecuted, because said offense had not then been completed, and could not then have been prosecuted. * * * It is true that the greater offense always includes the lesser. And it is also true that where an offense consists of different degrees, and the defendant, upon indictment or information, is convicted or acquitted of any grade of such offense, such conviction or acquittal is a bar to any further prosecution of the offense. * * * But these rules do not apply where the higher grade of the offense has not been completed at the time of the conviction or acquittal of a lesser grade included within it, because such higher grade did not then exist.

III.

A more serious question is, Was the defendant denied his constitutional right to meet the witnesses against him face to face?

In the Supreme Court of the Philippine Islands the defendant made the following assignment of errors (R., 48):

I.

The trial court erred in deciding this case, the evidence for the prosecution not showing that the alleged crime was committed within the jurisdiction of the Court of First Instance of Occidental Negros.

II.

The court erred in finding that Gabriel Diaz had assaulted and beaten the deceased Cornelio Alcanzaren.

III.

The trial court having assumed that the assault was actually committed, it erred in declaring that the deceased after the assault was unable to devote himself to his usual occupations until he died.

IV.

The court erred in declaring that the assault, if any existed, was the cause of the deceased's death.

V.

The court erred in overruling defendant's plea that he had been put once before in jeopardy of punishment for the same offense.

It is to be observed that here no complaint is made that the record of the preliminary investigation and of the trial for assault and battery was used as substantive evidence against him. That

this had been done was apparent from the opinion of the Court of First Instance. But he complained only of the sufficiency of the evidence to show the jurisdiction of the court and his guilt of the offense charged, and of the overruling of his plea of former jeopardy.

Both the Philippine courts held that the defendant had himself put the record in evidence and for every purpose. And there is good reason for this. In addition to supporting his plea of former jeopardy it contained evidence which he believed to be favorable to himself. There was his own testimony (R., 18), and the evidence of Dr. Suarez, whom he had himself suggested as a proper person to conduct the post-mortem examination, and who reported after an external examination of the body of Alcanzaren that "it is impossible to arrive at any definite conclusion as to the cause of the death of the deceased" (R., 6), and after the autopsy "that the examination made by me fails to show any connection between the death of the said party and any bodily injuries received by him" (R., 19). True, the Philippine courts were not persuaded by this, but found evidence in the record of another tendency and more cogency.

It is to be remembered that a single document contained the record of the preliminary investigation and of the trial for assault and battery, and that the record of the trial for assault and battery was in fact a part of the record of the preliminary investigation.

In support of his special plea of former jeopardy the defendant clearly brought this entire document into the case. He alleges the judgment against him in the prosecution for assault and battery and his liquidation of that judgment, both of which, he says, appear " at the end of the preliminary investigation " which he " now adduces as prima facie evidence in these proceedings." (R., 25.)

The mere judgment against him was not prima facie evidence of a former conviction of the same assault. There must be something to identify the assault in each case as one and the same. Now the entire document, the record of the preliminary investigation, containing within itself the record of the trial for assault and battery, did that. It made a prima facie case, or rather a conclusive one, so far as the facts were concerned. It left no doubt that the assault involved in the two proceedings was one and the same. The plea of the defendant, if sound in law, must prevail upon the evidence of that record alone. And so he adduced it as " prima facie evidence in these proceedings."

The Supreme Court of the Philippines held, in effect, that this record once in the case was always in the case, and in for one purpose was in for every purpose.

The entire document was used as if in the case on the examination of Priano and Francisco. The evidence of neither one of these witnesses is complete without reference to the record of the pre-

liminary investigation. The testimony of Priano was read to him, but it was not set out as read, because it was deemed already in the case. And his testimony with reference to this is taken in a manner indicating that the record was in the case. In order to understand it, to make it complete, we must read his comment in connection with the record. And the same thing is true of Francisco. (R., 33 to 36.)

And so when Pelagio Carbajosa testified. He is shown the record of the preliminary investigation and examined upon it respecting the testimony of Francisco and Priano, and his testimony is incomplete without that record. (R., 37.) But that was believed to be in the case and was dealt with accordingly.

Defendant's counsel dealt with it as in the case. He brought it to the attention of Carbajosa to identify the signature of Dr. Suarez to the certificate of the post-mortem examination, to put that beyond question as to authenticity, for it was testimony favorable to the defendant. (R., 38.)

When counsel for defendant formally and a second time offered the document in evidence it is true he said, " I now offer in evidence the record of the proceedings in the case for a misdemeanor, which is the only proof, and that's all " (R., 40); but he none the less offered the entire document, and meant the entire document. And court and opposing counsel so understood him.

Instead of joining in submitting the case when that record was offered, the prosecution asked an adjournment for the purpose of introducing evidence in rebuttal.

Evidence in rebuttal of what? Certainly not in rebuttal of the fact that Diaz had been prosecuted and fined for assault and battery. No; it was in rebuttal of testimony shown by the record of the preliminary investigation, and by that alone, and in rebuttal of that very portion of it upon which counsel for defendant put his finger in the cross-examination of Carbajosa, the testimony or certificate of Dr. Suarez, which is contained in the record of the preliminary investigation, and in that alone.

Dr. Hilado was called in rebuttal manifestly of Dr. Suarez and only of him, and he was in the case only through the record of the investigation. Suarez said the examination "failed to show any connection between the death of the said party and any bodily injuries received by him." Hilado was put on to show that such injuries as Alcanzaren had received might well result in death.

That the testimony of Dr. Hilado was not conclusive, nor even very definite, but vague and uncertain, signifies nothing to the present purpose. The fact remains that he was called to rebut evidence which was contained only in the document offered by the defendant as his sole testimony.

Moreover, the post-mortem examination disclosed only by the record of the preliminary in-

vestigation is dealt with directly as being in evidence. Dr. Hilado says "the post-mortem examination disclosed no injury of the internal organs to which I have referred." (R., 42.) And then follows some examination upon this.

The entire cross-examination of Dr. Hilado (R., 43 to 45) by defendant is with a view to supporting the statement made by Dr. Suarez in his report of his first or external examination of the body of Alcanzaren, that the appearance of the abdomen might have been caused "by the application of some caustic substance." This statement by Suarez is found only in the report of the preliminary investigation.

The case was loosely tried on both sides. And all the evidence received was by consent of both sides. It is late now to make objection to any of it as incompetent. Had the objection been made at the trial an adjournment could have been had and the personal attendance of witnesses secured. The prosecution was content, perhaps constrained, to use the record of the investigation, and the defendant evidently preferred its meager transcript of the testimony of important witnesses against him to the presence and personal testimony of the witnesses.

But the courts of the Philippines found in the record sufficient evidence of the defendant's guilt.

There was unquestionably an assault by Diaz upon Alcanzaren, and it was without provocation.

Even Diaz said no more in explanation than that Alcanzaren had spoken disrespectfully to him. Twenty-six days thereafter Alcanzaren died. No reasonable suggestion of a cause of death other than the assault anywhere appears. That the assault was of an aggravated nature was not an afterthought prompted by the death of Alcanzaren. It was charged as such in the first complaint made by the mother-in-law on the day after. It was reported as such by the police, and was found to be so by the justice of the peace on his visit to the house where Alcanzaren lay. That the justice of the peace qualified his statements thereafter; that Dr. Suarez could see no connection between the death of Alcanzaren and the injuries received by him; that Priano and Francisco materially changed their testimony—all these things may have been of a piece with the difficulty of securing witnesses and the failure of some of them to attend at all. The Philippine courts would understand these things better than we, and they have found the defendant guilty.

Now counsel who tried the case in the Philippine courts pass out of the case. Other counsel appear, and for the first time, and by the assignment of errors made for the consideration of this court is presented the objection that the record of the preliminary investigation was incompetent as testimony and that the defendant was entitled to be confronted by the witnesses against him. This was not because the accused discovered or was informed

now for the first time of the rights guaranteed to him by the United States; it was a change in plan of defense. His plea of former jeopardy was based in terms upon section 26 of General Order No. 58. Section 15 of the same order confers the right of confrontation by witnesses. It was, no doubt, because no question as to this had been presented, or intended to be presented, in the insular courts that Torres, J., allowed the writ of error only "in so far as concerns the question of double jeopardy."

It is not suggested that the writ of error could be limited in such manner. This court determines for itself what is before it for review. But this court will not ordinarily take cognizance of any question not presented in the courts below, although it has discretion to do so, and will not be overmuch reluctant to do so in criminal cases "when rights are asserted which are of such high character as to find expression and sanction in the Constitution or bill of rights." *Weems* v. *United States,* 217 U. S. 349, l. c. 362. But the *Weems* case was very different from the one at bar. There was nothing there in the nature of consent or waiver, and could not have been. The objection there considered was to the law itself, under which Weems had been convicted and sentenced, that it was void because it imposed cruel and unusual punishment. So in that case there was simply an omission to urge a substantial and an undeniable right in the lower courts, from which omission the accused could gain nothing and the Government could

lose nothing, and no special advantage resulted to the accused nor prejudice to the Government from the tardy assertion of the right in this court. The cruel and unusual punishment should not be imposed even though the accused consented to it.

The case at bar is a very different one. The right of the accused, which is involved, is not an inalienable one. He may waive it in any case, and it may be very much to his advantage to waive it.

In *Hancock* v. *The State,* 14 Tex. App. 392, the defendant, who was under indictment as an accomplice in a certain murder, in order to obviate a continuance of the case by the State, agreed that the prosecution might read as the evidence of the two absent witnesses their testimony given on the trial of his accomplice as the same was found reported in the case of *Scott* v. *State,* 12 Tex. App. 594; which was done. Subsequently the defendant complained of this as error. The Court of Appeals of Texas rejected this contention, saying (pp. 401, 402):

> We do not think so. Defendant agreed to the admission of the testimony, and but for his agreement, doubtless it would never have been offered in this shape. He cannot be heard to complain where he was a party to, and where his own action brought about, the very matter of which he complains. He could waive the presence of the witnesses if he so desired, and agree that if present they would swear as they had previously done. In fact, he could waive any right guaranteed

> him by the Constitution and laws, except the right of trial by jury. (Code Crim. Proc., Art. 23.)

If the right of confrontation is absolute and inalienable it can not be bartered for the waiver of the State's right to a continuance.

In other cases the mere agreement of the defendant that the witness against him need not testify in person at the trial without anything in consideration thereof being done or waived by the State has been held to be valid and binding.

In *Rosenbaum* v. *The State*, 33 Ala. 354, there was a stipulation that a deposition taken in a civil case might be read in evidence against the defendant. It was admitted over the objection of the defendant. The Supreme Court said (p. 363):

> If it be contended, that the ruling of the court [admitting in evidence an affidavit which the defendant had stipulated might be read in evidence] denied to the accused his constitutional right "to be confronted by the witnesses against him," we answer that this, like many other constitutional privileges, may be waived by the defendant, in such a case as this. All the admissions of facts, or that certain witnesses, if present, would prove certain facts, made by defendants for the purpose of a trial, rest on this principle.

In *Williams* v. *The State,* 61 Wis. 281, which was a conviction of the crime of murder, the testimony of a physician taken at the coroner's inquest

was by agreement read in evidence at the trial. In the Supreme Court the defendant made objection to this, and the answer was, " It is well settled that the accused may waive his right to be confronted with the witnesses on the trial " (p. 292). And to the same effect is *The State* v. *Fooks,* 65 Ia. 452.

This court held in *Reynolds* v. *United States,* 98 U. S. 145, that the right in question was not an absolute one, but might be forfeited by the defendant, as where, by his wrongful procurement, the witness is absent. The court said (p. 158):

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

In *West* v. *Louisiana,* 194 U. S. 258, on trial of defendant for larceny the State court received in evidence the testimony of a certain witness given

at the preliminary investigation upon proof that he was a nonresident of the State permanently absent therefrom, and his attendance could not be secured. This court, in rejecting the contention that this was in violation of the " due process of law " clause of the Fourteenth Amendment, said (p. 263):

> Coming to a decision of the question before us, we are of opinion that no Federal right of the plaintiffs in error was violated by admitting this deposition in evidence. Its admission was but a slight extension of the rule of the common law, even as contended for by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. * * * The accused has, as held by the state court in such case, been once confronted with the witness and has had opportunity to cross-examine him, and it seems reasonable that when the State cannot procure the attendance of the witness at the trial, and he is a non-resident and is permanently beyond the jurisdiction of the State, that his deposition might be read equally as well when his attendance could not be enforced because of death or of illness, or his evidence given by reason of insanity. * * *

In *Dowdell* v. *United States,* 221 U. S. 325, this court held that the face to face provision of the Philippine bill of rights did not prohibit the judge and clerk of the trial court from certifying as ad-

ditional record to the appellate court what had transpired on the trial of one convicted of a crime without the accused being present when the order was made. While this case does not determine the precise question here involved, it likewise recognizes that " this general rule of law embodied in the Constitution, and carried by statute to the Philippines, and intended to secure the right of the accused to meet witnesses face to face, and to thus sift the testimony produced against him, has always had certain well recognized exceptions " (p. 330).

We have, then, a case in which the right of the defendant is one which he could waive and did waive, and which beyond challenge he did not insist upon in either of the Insular courts before which he was tried, and asserts for the first time, more than two years after his trial in the Court of First Instance and when it is manifest from the record that to secure the attendance of the witnesses upon a retrial of the cause will be extremely difficult, if not altogether impossible.

Nothing is shown to justify a disregard of the general rule that, to secure here a review of a ruling made by the court below, the record must show that the question was raised for consideration in the lower court.

The *Weems* case is not in point, because of the nature of the question involved. In *Crawford* v. *United States,* 212 U. S. 183, the objection consid-

ered by the court, which it was contended had not been made in the court below, had been made in substance, if not precisely in proper form. In *Clyatt* v. *United States,* 197 U. S. 207, the contention of the defendant sustained by this court was that there was a complete failure to prove an essential fact in the case, because of which the defendant should have been acquitted. The court, upon the authority of *Wiborg* v. *United States,* 163 U. S. 632, considered the question and reversed the case, although no motion to direct a verdict for defendant, the proper proceeding, had been made in the trial court. But there was nothing in the case in the nature of waiver or consent, simply a failure to interpose the motion. The *Wiborg* case, in this respect, was precisely like the *Clyatt* case. There was a failure of proof of the guilt of two of the defendants, and no motion by them to direct a verdict in their behalf. The error in these cases was a vital one and inhered in the record of each. The defendant in each case was stoutly contesting the charge against him, and it was not sustained by the proof. He consented to nothing, he waived nothing, and omitted simply the usual formal method of securing that to which he was clearly entitled and which, in some manner, he was insisting upon throughout.

Here, however, a question not in the case, a question of the competency of evidence, which could be brought into the case only by the affirmative action of the defendant, that is, by objection

to the introduction of the evidence, is brought into the case for the first time by the assignment of errors filed under the writ of error from this court, and this it was held in *Ansbro* v. *United States,* 159 U. S. 695, could not be done.

The case should be governed by *Paraiso* v. *United States,* 207 U. S. 368. Paraiso in this court assigned as error that he "was required to answer without being advised of the nature and cause of the accusation against him, and that he was convicted without due process of law." He raised no such questions in the Philippine courts. As to what he in fact did in the lower courts, this court said (p. 370):

> * * * The most that could be gathered from this record is that the plaintiff in error contended that the complaint was bad by the rules of criminal pleading. See *Cornell* v. *Green,* 163 U. S. 75, 79. There was no hint that he relied on the bill of rights or contended that the complaint would not satisfy that. The bill of rights, in all probability, was an afterthought when everything else had failed.

And so we believe of the case at bar. Diaz was quite content, until disappointed in the result, that the case should be tried as it was; that the record of the preliminary investigation should be received in evidence, in its entirety, for it clearly supported his plea of jeopardy and required his acquittal if the plea was good in point of law, and

that as substantive evidence relative to the offense itself he was content that it should be received, because it contained matter favorable to him, and presented in less effective form, than from the lips of living witnesses, the testimony against him. But the plea of jeopardy was held to be bad, and the evidence of his guilt was held to be sufficient, and the assertion of his right to be confronted by the witnesses against him " in all probability was an afterthought when everything else had failed "— a new defense interposed by new counsel as a *dernier ressort.*

It appears from the record that at the sessions of the court held on September 20 and 21, 1907, the accused was not present. He sent a telegram waiving his right to be present, and the trial proceeded, by consent of court and counsel, in his absence. This is now, and for the first time, presented as an objection to the validity of the judgment.

The case was not decided until December 24, 1907. No objection on account of the defendant's absence was made at any time to the Court of First Instance. Antonio Jayme, who represented him at the trial, does not appear as counsel for accused in the Supreme Court of the Philippines, Messrs. Haussermann, Ortigas, Cohn, and Fisher appearing for him there. They do not make the objection in that court, and when they sue out the writ of error from this court they do not mention it in their assignment of errors It is raised for the first time in

the brief filed here, when again there is change of counsel.

The provisions of the Philippine law as to the presence of the defendant at his trial are to be found in the "Compilation of the Acts of the Philippine Commission, 1907," and are as follows:

CHAPTER 278.

SEC. 3270. In all criminal prosecutions the defendant shall be entitled—

(*a*) To appear and defend in person and by counsel at every stage of the proceedings.

* * * * *

(*e*) To be confronted at the trial by and to cross-examine the witnesses against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answer in the presence of the accused or his counsel, the defense having had an opportunity to cross-examine the witness, the deposition of the latter may be read upon satisfactory proof to the court that he is dead or insane or cannot with due diligence be found in the Islands.

* * * * *

SEC. 3271. When a complaint or information shall have been filed the defendant must be arraigned thereon before the court in which it is filed, unless the cause shall have been transferred elsewhere for trial. If the charge is for felony (delito), the defendant must be personally present at the arraignment; but if for a misdemeanor (falta), he may appear by counsel.

CHAPTER 279.

SEC. 3280. A plea of guilty can be put in only by the defendant himself in open court. The court may at any time before judgment upon a plea of guilty permit it to be withdrawn and a plea of not guilty substituted.

CHAPTER 280.

SEC. 3296. The defendant must be personally present at the time of pronouncing judgment if the conviction is for a felony; if for a misdemeanor, the judgment may be pronounced in his absence.

Section 3270 confers the right upon the defendant *in all criminal prosecutions* to be present at every stage of the proceedings. It does not, however, require his presence. This results from the terms of the statute, which confer a right simply, and do not prescribe an indispensable condition of valid trial or due process of law.

That this is the significance of section 3270 is made plain by other provisions.

Section 3271 discriminates between felonies and misdemeanors, and provides that, in the first case, the defendant *must be personally present at the arraignment,* while in the case of misdemeanors he *may* appear by counsel.

Section 3280 provides that a plea of guilty in any case can be put in only *by the defendant himself* in open court. The implication of this is that

other pleas allowed by the code may be put in by counsel.

Section 3296 requires that the defendant must be personally present at the time judgment is pronounced *if the conviction is for felony,* but if the conviction is for misdemeanor judgment may be pronounced in his absence.

The sum of the code provisions is that in all criminal prosecutions the defendant is entitled to be present at every stage of the proceedings, and in all criminal prosecutions a plea of guilty can be put in only by the defendant himself in open court, and that in prosecutions for felony the defendant must be personally present at the arraignment and when judgment is pronounced.

Presence at other stages of the prosecution is a right which may be waived. The case is therefore clearly distinguishable from *Hopt* v. *Utah,* 110 U. S., 574, in which the requirement of the code was that "if the indictment is for a felony, the defendant *must be personally present at the trial.*"

The defendant waived his right of presence, and it is too late to insist upon it for the first time in the argument of the case at the bar of this court.

We respectfully submit that the judgment herein should be affirmed.

F. W. LEHMANN,
Solicitor General.

NOVEMBER, 1911.

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DIAZ *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 384. Argued November 16, 1911.—Decided February 19, 1912.

The provision against double jeopardy in the Philippine Act of July 1, 1902, 32 Stat. 691, c. 1369, § 5, is in terms restricted to instances where the second jeopardy is for the same offense as was the first. *Gavieres* v. *United States*, 220 U. S. 338.

A charge of homicide made after death of the person assaulted is not the same as a charge of the assault before the death of that person.

One cannot be put in jeopardy for the offense of homicide prior to the death of the person upon whom the crime is committed.

Jeopardy cannot extend to an offense beyond the jurisdiction of the court in which the accused is tried.

One convicted in the Philippine Islands of assault before the death of the injured person is not put in second jeopardy, within the meaning of § 5 of the Philippine Act of 1902, by being placed on trial for homicide after the death of the person assaulted as a consequence of the assault.

The right of confrontation with witnesses secured by § 5 of the Philippine Act of July 1, 1902, is in the nature of a privilege extended to, rather than a restriction placed upon, the accused, and can be waived or asserted as he sees fit.

The admission by consent of the accused, without qualification or restriction of testimony taken elsewhere, is not a denial of the right of confrontation with witnesses secured by § 5 of the Philippine Act of July 1, 1902, and when so admitted, the testimony is equally available to the Government and to the accused.

When evidence taken elsewhere is admitted generally and without restriction by consent of the accused, it is not subject to the objection that it is hearsay.

The right to be heard by himself and counsel secured to the accused in all criminal prosecutions by § 5 of the Philippine Act of July 1, 1902, is the substantial equivalent of the similar right embodied in the Sixth Amendment, by which it should be measured. *Kepner* v. *United States*, 195 U. S. 100.

One not in custody cannot avail of the right to be heard so as to defeat the right of the Government to try him by absenting himself voluntarily and claiming that under the right to be present provisions of the Sixth Amendment the trial cannot proceed.

While the rule may be otherwise in cases that are capital, or where the accused is in custody under the control of the court, or where special statutory provisions apply, where the offense is not capital, and the accused is not in custody, his voluntary absence does not nullify what has been done in, or prevent the completion of, his trial, but operates as a waiver of his right to be present and leaves the court free to proceed; and so *held* that the continuation of the trial during the voluntary absence of the accused in this case while it proceeded with his counsel present did not violate the provisions of § 5 of the Philippine Act of July 1, 1902, giving him a right to be present and heard.

Although concurrent findings of fact by both the Court of First Instance and the Supreme Court of the Philippine Islands are entitled to great respect, this court may independently examine the evidence, and in this case, after so doing it affirms the judgment.

15 Phil. Rep. 123, affirmed.

On May 30, 1906, at San Carlos, Province of Occidental Negros, Philippine Islands, Gabriel Diaz, by blows and kicks, inflicted bodily injuries upon Cornelio Alcanzaren, and by reason thereof was the next day charged before the justice of the peace of San Carlos with assault and battery. At the hearing upon that charge Diaz was found guilty of a misdemeanor and fined fifty pesetas and costs, which he paid. Subsequently, on the twenty-sixth of June, Alcanzaren died, and Diaz was then charged before the same justice of the peace with homicide, it being alleged that the death ensued from the bodily injuries. At the preliminary investigation of this charge the justice concluded that there was reasonable cause to believe that it was well founded and accordingly held the accused to await the action of the Court of First Instance. There was then filed in that court a complaint charging Diaz with the crime of homicide, not capital, upon which he subsequently was tried, found guilty, and sentenced to a term of imprisonment and other penalties.

When called upon to plead in the Court of First Instance Diaz interposed a plea of former jeopardy, supported by a copy of the record of the proceedings before the justice of the peace upon the charge of assault and battery and at the preliminary investigation, but the plea was overruled. Then, during the trial, his counsel introduced in evidence the record of those proceedings. In doing this the counsel spoke only of "the proceedings in the case for a misdemeanor," but it otherwise appears that what was meant was the record of both proceedings. Both were embraced in a single document, authenticated by a single certificate, and it clearly is disclosed that counsel on both sides and the court treated the entire document as in evidence. It embraced the testimony produced before the justice at the hearing upon the assault and battery charge and at the preliminary investigation, including the personal statement of the accused and the report of an au-

topsy, upon the body of the deceased, performed conformably to the Philippine law; and it was partly upon this testimony that the Court of First Instance rested its judgment of conviction.

On two occasions, covering the examination and cross-examination of two witnesses for the government, Diaz, who was at large on bail, voluntarily absented himself from the trial, but consented that it should proceed in his absence, but in the presence of his counsel, which it did.

Following his conviction, Diaz prosecuted an appeal to the Supreme Court of the Philippines, where, subject to a change made in the term of imprisonment (see *Trono* v. *United States*, 199 U. S. 521; *Flemister* v. *United States*, 207 U. S. 372), the conviction was sustained, 15 Philippines, 123, and the case was then brought here.

Mr. Frederic R. Coudert, with whom *Mr. Howard Thayer Kingsbury* was on the brief, for plaintiff in error:

This court has jurisdiction of the cause and power to review all questions involved therein. § 10, Philippine Civ. Govt. Act, 32 Stat. 695.

Having jurisdiction of the case there exists the power to consider any question arising on the record. *Penn Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695; *Giles* v. *Harris*, 189 U. S. 475, 486; *Horner* v. *United States*, 143 U. S. 570, 577; *Burton* v. *United States*, 196 U. S. 283, 295.

The conviction was based upon the testimony of witnesses with whom the defendant was not confronted. 32 Stat. 692; Phil. Comp. Stat., § 3270. Defendant cannot waive this right nor can he legally consent that the trial proceed in his absence. *Thompson* v. *Utah*, 170 U. S. 343, 354; *Hopt* v. *Utah*, 110 U. S. 574. *West* v. *Louisiana*, 194 U. S. 258, does not apply.

The use of the evidence against the defendant in the homicide trial was, therefore, in itself reversible error. *Motes* v. *United States*, 178 U. S. 458.

The introduction of the record of the assault case upon the homicide trial was merely in support of the defendant's plea of former jeopardy, and was so recognized by the court below (Rec., p. 51). Such record was merely evidence of the jeopardy. It was not, and could not be evidence of the facts which were in issue in the former trial. *Kirby* v. *United States*, 174 U. S. 47, 55.

The defendant's plea of former jeopardy was good and should have been sustained. A prosecution for assault and battery bars a second prosecution for homicide for the same act, where the person assaulted dies after the first and before the second prosecution.

This question appears never to have been presented to this court or to any American court of high authority, and is, therefore, open, and to be determined on principle, particularly in view of the conflicting character of the precedents in other courts. § 5 of Phil. Civ. Gov. Act; § 3281 Phil. Comp. Stat.; *Kepner* v. *United States*, 195 U. S. 100; *Trono* v. *United States*, 199 U. S. 521; *Gavieres* v. *United States*, 220 U. S. 338; Hammond's Blackstone, IV, 431; *Burton* v. *United States*, 202 U. S. 344, 380; *Carter* v. *McClaughry*, 183 U. S. 365, 395; *Hans Neilsen, Petitioner*, 131 U. S. 176.

To make the same act constitute several different crimes and prosecute for them all *seriatim* opens possibilities of persecution which the rule against second jeopardy is designed and should be made effective to prevent. *State* v. *Cooper*, 1 Green (N. J. Law), 361; *Queen* v. *Elrington*, 1 B. & S. 187; *Reg.* v. *Miles*, 17 Cox Cr. Cas. 9. See also *Reg.* v. *Stanton*, 5 Cox Cr. Cas. 324; *Wemyss* v. *Hopkins*, L. R. 10 Q. B. 378; *Reg.* v. *King*, 18 Cox Cr. Cas. 447; *Blair* v. *Georgia*, 81 Georgia, 629.

See dissent in *Reg.* v. *Morris*, L. R., 1 Crown Cases Reserved, 90. In that case and in *Reg.* v. *Salvi*, 10 Cox Cr. Cas. 481 (note); *Burns and Cary* v. *The People*, 1 Park. Cr. Rep. (N. Y.) 182; *Commonwealth* v. *Roby*, 12 Pick.

(Mass.) 496; *Commonwealth* v. *Evans*, 10 Massachusetts, 25; *State* v. *Littlefield*, 70 Maine, 452, either a new fact supervenes, for which the defendant is responsible, and changes the character of the offense, thus constituting a new and distinct crime, or relates back to the time of the assault. In other words, a man may first be prosecuted and punished for his act, and afterwards for its consequences; but see *Reg.* v. *Bird*, 5 Cox Cr. Cas. 1, 20, rendered after the passage of an English statute providing that upon any indictment for felony, involving an assault, the jury might acquit of the felony and convict of the assault.

Under the laws of the Philippine Islands, upon any prosecution the court may convict of any subsidiary offense involved in the offense charged. § 3284, Phil. Comp. Stat.; *United States* v. *Pineda*, 4 Phil. Rep. 223. In the case at bar, therefore, defendant might upon the homicide trial have been convicted of the very assault for which he had already been prosecuted and fined. He has, therefore, been twice in jeopardy for the same offense, in violation of the United States Constitution and the Philippine Civil Government Act; his second prosecution was unlawful and his conviction should be set aside. *Reg.* v. *Walker*, 2 Moody & Robertson, 446.

The conviction was without any competent evidence to support it and was contrary to law.

In reviewing a judgment based on the verdict of a jury the court can always consider whether there was any evidence to sustain the conclusion reached. *Halsell* v. *Renfrew*, 202 U. S. 287, 292; *Lancaster* v. *Collins*, 115 U. S. 222, 225; Phil. Comp. Stat., §§ 2764, 2765, 3311.

The presumption of innocence is expressly provided for by the Philippine statutes. § 3309, Phil. Comp. Stat.

It is an integral and essential portion of the law of this country as laid down by this court. *Kirby* v. *United States*, 174 U. S. 47, 55; *Coffin* v. *United States*, 156 U. S. 432, 458.

The Solicitor General for the United States:

The jurisdiction of this court under the writ of error is restricted to the question, whether any rights of the defendant secured by the Constitution or statutes of the United States have been violated. *Ong Chang Wing* v. *United States*, 218 U. S. 272; *Dowdell* v. *United States*, 221 U. S. 325.

The conviction upon the prosecution for assault and battery was not a bar to the prosecution for the homicide resulting from the assault. *Grafton* v. *United States*, 206 U. S. 333; *Commonwealth* v. *Roby*, 12 Pick. (Mass.) 496; *State* v. *Littlefield*, 70 Maine, 452; *Johnson* v. *State*, 19 Tex. App. 453; 1 Bishop's New Crim. Law, § 1059.

The right of the defendant to be confronted by the witnesses against him was not violated, for the record of the preliminary investigation was in evidence by his act and with his consent, for every purpose to which it was relevant. *Hancock* v. *State*, 14 Tex. App. 392; *Rosenbaum* v. *State*, 33 Alabama, 354; *State* v. *Fooks*, 65 Iowa, 452; *Williams* v. *State*, 61 Wisconsin, 281; *Reynolds* v. *United States*, 98 U. S. 145; *Ansbro* v. *United States*, 159 U. S. 695; *West* v. *Louisiana*, 194 U. S. 258; *Paraiso* v. *United States*, 207 U. S. 368; *Weems* v. *United States*, 217 U. S. 349; *Dowdell* v. *United States*, 221 U. S. 325.

MR. JUSTICE VAN DEVANTER, after stating the case as above, delivered the opinion of the court.

The provision against double jeopardy, in the Philippine Civil Government Act of July 1, 1902, 32 Stat. 691, c. 1369, § 5, is in terms restricted to instances where the second jeopardy is "for the same offense" as was the first. *Gavieres* v. *United States*, 220 U. S. 338. That was not the case here. The homicide charged against the accused in the Court of First Instance and the assault and battery for which he was tried before the justice of the peace, al-

though identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense. *Commonwealth* v. *Roby*, 12 Pick. 496; *State* v. *Littlefield*, 70 Maine, 452; *Johnson* v. *State*, 19 Tex. App. 453. Besides, under the Philippine law, the justice of the peace, although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction. All that could be claimed for that jeopardy was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done under Phil. Comp. Stat., § 3284. *State* v. *Littlefield*, *supra*. It follows that the plea of former jeopardy disclosed no obstacle to the prosecution for homicide.

It is objected that the accused was deprived of the right, secured to him by § 5 of the Philippine Civil Government Act, *supra*, "to meet the witnesses face to face," in that the judgment of conviction for homicide was rested in part upon the testimony produced before the justice of the peace at the trial for assault and battery and at the preliminary investigation. But this objection overlooks the circumstances in which the record wherein that testimony was set forth was received in evidence. It was not offered by the Government, but by the accused, and was offered without qualification or restriction. And it is otherwise manifest that the offer included the testimony embodied in the record as well as the recitals of what

was done by the justice. It was all received just as it was offered, no objection being interposed by the Government. In some respects the testimony was favorable to the accused and in others favorable to the Government. It included a statement by the accused, who refrained from testifying in the Court of First Instance, and also the report of an autopsy which was favorable to him. In these circumstances the testimony was rightly treated as admitted generally, as applicable to any issue which it tended to prove, and as equally available to the Government and the accused. *Sears* v. *Starbird*, 78 California, 225, 230; *Diversy* v. *Kellogg*, 44 Illinois, 114, 121. True, the testimony could not have been admitted without the consent of the accused, first, because it was within the rule against hearsay and, second, because the accused was entitled to meet the witnesses face to face. But it was not admitted without his consent, but at his request, for it was he who offered it in evidence. So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible. *Damon* v. *Carrol*, 163 Massachusetts, 404, 408; *Sherwood* v. *Sissa*, 5 Nevada, 349, 355; *United States* v. *McCoy*, 193 U. S. 593, 598; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1, 9; *Neal* v. *Delaware*, 103 U. S. 370, 396; *Foster* v. *United States*, 178 Fed. Rep. 165, 176. And of the fact that it came from witnesses who were not present at the trial it is to be observed that the right of confrontation secured by the Philippine Civil Government Act is in the nature of a privilege extended to the accused, rather than a restriction upon him, *State* v. *McNeil*, 33 La. Ann. 1332, 1335, and that he is free to assert it or to waive it, as to him may seem advantageous. That this is so is a necessary conclusion from the adjudged cases relating to the like right secured by the constitutions of the several States and the Constitution of the United

States. Thus, it is held that the right is waived where, by the consent of the accused, the prosecution is permitted to read in evidence the testimony of an absent witness given in some prior proceeding, *Hancock* v. *State*, 14 Tex. App. 392; *Rosenbaum* v. *State*, 33 Alabama, 354; *Williams* v. *State*, 61 Wisconsin, 281; *State* v. *Polson*, 29 Iowa, 133; or a statement of what such a witness would testify, if present, as embodied in an agreement made to avoid a continuance or to dispense with the presence of the witness, *State* v. *Wagner*, 78 Missouri, 644, 648; *State* v. *Fooks*, 65 Iowa, 452; *State* v. *Mortensen*, 26 Utah, 312; *State* v. *Lewis*, 31 Washington, 75, 88; or the deposition of such a witness taken within or without the jurisdiction, *Butler* v. *State*, 97 Indiana, 378; *State* v. *Vanella*, 40 Montana, 326; *Wightman* v. *People*, 67 Barb. 44; *People* v. *Guidici*, 100 N. Y. 503, 508; *People* v. *Murray*, 52 Michigan, 288. In the last case, which involved a conviction for murder in the second degree, the question presented and the ruling thereon were stated by Judge Cooley as follows (p. 290):

"A chief ground of error relied upon is that the prosecution was allowed to put in evidence certain depositions taken out of court of witnesses not present at the trial. The facts seem to be that the attorneys for the respective parties stipulated to put in certain depositions on both sides, and they were put in accordingly. This, it is said, was in violation of the respondent's constitutional right to be confronted with his witnesses. But the court made no ruling in the matter; what was done was voluntarily done by the parties; the defendant had the benefit of the stipulation, and, for aught we can know, it may have been made chiefly in his interest. . . . The defendant undoubtedly had a constitutional right to be confronted with his witnesses. He waived that right in this case, apparently for his own supposed advantage and to obtain evidence on his own behalf. It would have been a mere impertinence for the court to have interfered and pre-

cluded this stipulation being acted upon. But it would have been more than an impertinence; it would have been gross error. And it would be palpable usurpation of power for us now to set aside a judgment for a neglect of the court not at the time complained of, but in respect to something where any other course would have been plain error. Under the view taken by the respondent it would seem that when the evidence had been obtained under his stipulation, the court was put in position where it was impossible to avoid error; for if the evidence was received, he might complain, as he does now, that his constitutional right was violated, and if the court refused to receive it when he was consenting, the respondent would be entitled to have the conviction set aside for that error."

The view that this right may be waived also was recognized by this court in *Reynolds* v. *United States*, 98 U. S. 145, 158, where testimony given on a first trial was held admissible on a second, even against a timely objection, because the witness was absent by the wrongful act of the accused. In that case it was said:

"The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

As here the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question,

and thereby sought to obtain an advantage from it, he waived his right of confrontation as to that testimony and cannot now complain of its consideration.

It also is objected that the accused was wrongly convicted in that the trial proceeded in part in his absence. The facts in this connection are these: The accused was represented and heard by counsel at every stage of the proceedings. He also was present in person at all the proceedings preliminary to the trial and at the time it was begun and during the major part of it. But on two occasions, in the latter part of the trial, he voluntarily absented himself and sent to the court a message expressly consenting that the trial proceed in his absence, which was done. On these occasions two witnesses for the Government were both examined and cross-examined. No complaint grounded upon his absence was made in the trial court or in the Supreme Court of the Philippines; and the objection now made is, not that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence.

The Philippine laws, Comp. Stat. 1907, pp. 1004, 1005, 1006, 1009, contain the following provisions, bearing upon the presence of the accused at the proceedings upon a charge for felony:

"SEC. 3270. In all criminal prosecutions the defendant *shall be entitled* (a) to appear and defend in person and by counsel at every stage of the proceedings. . . .

"SEC. 3271. . . . If the charge is for felony (*delito*), the defendant *must* be personally present at the arraignment; . . .

"SEC. 3280. A plea of guilty can be put in *only* by the defendant himself in open court. . . .

"SEC. 3296. The defendant *must* be personally present at the time of pronouncing judgment if the conviction is for a felony; . . ."

Not only is there such a difference in the terms of these sections as naturally implies a difference in meaning, but it is evident that unless the first means something less than that the accused must be present at every stage of the proceedings there was no occasion for the provisions quoted from the others, and also that if the terms used in the others were deemed essential to express the thought that the accused must be present at particular stages of the proceedings, like terms would have been employed in the first had it been intended to make his presence equally requisite at other stages. It, therefore, is evident that the effect of these sections, when their differing terms are considered, is to make the presence of the accused indispensable at the arraignment, at the time the plea is taken, if it be one of guilt, and when judgment is pronounced, and to entitle him to be present at all other stages of the proceedings, but not to make his presence thereat indispensable. As here it does not appear, and is not claimed, that the accused was absent at any of the times when his presence was thus made indispensable, and as his absence during the latter part of the trial was not only voluntary, but coupled with an express consent that it should proceed in the presence of his counsel, as was done, it is plain that there was no infraction of the Philippine laws in that regard.

We are thus brought to the question whether the provision in § 5 of the Philippine Civil Government Act, securing to the accused in all criminal prosecutions "the right to be heard by himself and counsel," makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert but which he also may waive by his voluntary act. Of course if that provision makes his presence thus indispensable, it is of no moment that the Philippine laws do not go so far, for they cannot lessen its force or effect. An identical or similar provision is found in the constitutions of the

several States, and its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States. It is the right which these constitutional provisions secure to persons accused of crime in this country that was carried to the Philippines by the congressional enactment, and, therefore, according to a familiar rule, the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there. *Kepner* v. *United States*, 195 U. S. 100, 124.

As the offense in this instance was a felony, we may put out of view the decisions dealing with this right in cases of misdemeanor. In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction. But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present. *Fight* v. *State*, 7 Ohio, pt. 1, 181; *Wilson* v. *State*, 2 Oh. St. 319; *McCorkle* v. *State*, 14 Indiana, 39, 44; *Hill* v. *State*, 17 Wisconsin, 675; *Stoddard* v. *State*, 132 Wisconsin, 520; *Sahlinger* v. *People*, 102 Illinois, 241; *Gallagher* v. *People*,

211 Illinois, 158; *Barton* v. *State*, 67 Georgia, 653; *Robson* v. *State*, 83 Georgia, 166; *Price* v. *State*, 36 Mississippi, 531; *Gales* v. *State*, 64 Mississippi, 105; *State* v. *Ricks*, 32 La. Ann. 1098; *State* v. *Perkins*, 40 La. Ann. 210; *State* v. *Kelly*, 97 N. Car. 404; *Lynch* v. *Commonwealth*, 88 Pa. St. 189; *Gore* v. *State*, 52 Arkansas, 285; *State* v. *Hope*, 100 Missouri, 347; *Frey* v. *Calhoun Circuit Judge*, 107 Michigan, 130; *People* v. *Mathews*, 139 California, 527; *State* v. *Way*, 76 Kansas, 928; *Commonwealth* v. *McCarthy*, 163 Massachusetts, 458; *United States* v. *Davis*, 25 Fed. Cas. 773; *United States* v. *Loughery*, 26 Fed. Cas. 998; *Falk* v. *United States*, 15 App. D. C. 446, 454; *S. C.*, 181 U. S. 618.

The reasoning upon which this rule of decision rests is clearly indicated in *Barton* v. *State*, *supra*, where it is said by the Supreme Court of Georgia:

"It is the right of the defendant in cases of felony . . . to be present at all stages of the trial—especially at the rendition of the verdict, and if he be in such custody and confinement . . . as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside. . . . The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into the court by its order.

"But the case is quite different when, after being present through the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the court room where he and his bail obligated themselves that he should be. . . . And the absolute necessity of the distinction, or the abolition of the continuance of the bail when the trial begins, is seen, when it is considered that otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered."

True, in that case the defendant was absent only at the reception of the verdict, but the decisions, as also the reasoning upon which they proceed, embrace absences at other stages of the trial. In *Falk* v. *United States, supra*, the accused, who was at large on bail, was present when the trial was begun and during the taking of a portion of the evidence for the Government, and then fled the jurisdiction. He was called and defaulted, and the trial proceeded in his absence, the remaining evidence being taken and a verdict of guilt returned. Subsequently he was apprehended, and sentence was then imposed, notwithstanding his objection that the trial had proceeded in his absence. In affirming the judgment the Court of Appeals, speaking through Mr. Justice Morris, said:

(p. 454) "It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute (Rev. Stat. of U. S. Sec. 1015) he is entitled as a matter of right to be enlarged upon bail 'in all criminal cases where the offense is not punishable by death;' and, therefore, in all such cases he may by absconding prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered. And this the counsel for the appellant appear candidly to admit. But we do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the adminis-

tration of justice as to the true interests of civil liberty. . . .

(p. 460) "The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield."

But it is said that the question has been ruled otherwise by this court in *Hopt* v. *Utah*, 110 U. S. 574; *Lewis* v. *United States*, 146 U. S. 370; *Schwab* v. *Berggren*, 143 U. S. 442, and *Thompson* v. *Utah*, 170 U. S. 343. We think this is not the import of those cases. In each the accused was in custody, charged with a capital offense, and was sentenced to death. In the first, a part of the trial was had in his absence notwithstanding the territorial statute declared that he "*must* be personally present." He did not object at the time, and it subsequently was claimed that, by his silence, he had consented to what was done. But this court held otherwise, saying: "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." In the second case, "the prisoner was not brought face to face with the jury until after the challenges had been made and the selected jurors were brought into the box to be sworn," and he excepted at the

time to the mode in which the challenges were required to be made. The ruling in this court was that the making of the challenges was an essential part of the trial, and that it was the right of the accused to be brought face to face with the jurors when the challenges were made. The other two cases are even less in point. In one the question was, whether the presence of the accused was essential in proceedings on error in an appellate court, and it was held that it was not essential. And in the other the question was, whether, when the applicable law contemplated that the accused should be tried before a tribunal composed of a court and a jury of twelve, he could by his silence or consent authorize a tribunal differently composed, and not recognized by law, to try him; and it was held that he could not.

We conclude that the Philippine laws before quoted accord to one charged with a felony the full right expressed in the congressional enactment, as that right was recognized and understood in this country at the time it was carried to the Philippines, and that in what was done in the present case there was no infringement of it.

Lastly, it is insisted that the evidence was inadequate to warrant the conviction. The trial was to the court without a jury, as is permitted in the Philippines, and both the trial court and the Supreme Court of the Islands concurred in finding the accused guilty under the evidence. Of course, these concurring findings are entitled to great respect. Nevertheless, following the rule recognized in *Wiborg* v. *United States*, 163 U. S. 632, 658, and *Clyatt* v. *United States*, 197 U. S. 207, 222, we have attentively examined the evidence as set forth in the record and discussed in the opinions of the Philippine courts, and are clearly of opinion that the conviction was warranted by it.

Judgment affirmed.

MR. JUSTICE LAMAR, dissenting.

I dissent, because the trial was conducted in accordance with the rules of procedure of the Spanish law, and in disregard of the fundamental changes made by the Bill of Rights of the Philippine Islands. The defendant was not given a speedy trial, but was kept in jeopardy during repeated and lengthy suspensions.

He was not confronted with the witnesses, but the court accepted his telegraphic waiver, and the trial thereafter proceeded without the defendant being present. Witnesses were examined, argument of counsel made, and three months later sentence was pronounced, all in his absence.

On appeal the judgment was reversed by the Supreme Court of the Philippines, not for the purpose of setting the judgment aside, but to inflict a penalty of more than twofold severity and to raise the term of imprisonment from six to fourteen years in the penitentiary.

The act of July 1, 1902, regulating the government of the Philippine Islands, does not provide for trial by jury, nor does it destroy the power of the appellate court to change the sentence in a criminal case. But the absence of the right to trial by jury, and the presence of the danger of appeal make it all the more important to enforce those safeguards copied from the Constitution of the United States and granted the people of those islands.

Barring the right to indictment and trial by jury the defendant charged with a felony before a Philippine court has substantially the same rights as though he were on trial in a United States court. And if this conviction can stand, it must be because the same things would be proper in this country, where the language of the Constitution is, in this respect, substantially the same as that of Philippine Bill of Rights.

SEC. 5. "That in all criminal prosecutions the accused

shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself."

Not only the fact that the defendant's liberty is involved, but the further fact that the decision will be a precedent in other cases, justifies a brief statement of the facts and reasons on which this dissent is based.

The opinion proceeds upon the theory that while a defendant has the right to be confronted with the witnesses, he may waive that privilege in all except capital cases. In support of that proposition many authorities are cited.

In some of these cases the defendant was voluntarily absent from the court room, for a short time, without the attention of the court being called to the fact. In others the defendant escaped while the trial was in progress. In others, having given bail, he failed to return in time to hear the verdict read. In all of them the court's decision was expressly, or by necessary implication, placed upon the ground that the defendant could not take advantage of his own wrong, and render a trial nugatory by escape or making an improper use of his bail.

These cases undoubtedly announce a correct rule. For, when the trial of a felony begins it ought to proceed in due and orderly course to verdict. The defendant has no right to force the court to order a mistrial. If he escapes or takes advantage of his bail to remain away during the trial, the court proceeds, not because it is willing that he should be absent, but because it is obliged to go on without him. But because the court is compelled so to act under

such facts, it does not follow that it could or would consent for him to be absent during the trial; or, that it would accept a formal waiver from him of the right to be confronted by the witnesses, or to be present when sentence was pronounced. As said in *Hopt's Case*, 110 U. S. 579:

"The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty. This is a mistaken view. . . . The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. . . . If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

It is true, as pointed out in the opinion of the court here, that this was said in a case where the defendant was on trial for his life. But the principle was announced in language which, repeatedly and expressly, made it applicable to felonies and wherever the defendant might be deprived of his life or liberty. The defendant, in such cases, cannot waive his right to be present when his liberty is involved, any more than when his life is at stake. And it is a misnomer to say that when he escapes or refuses to be present that he has waived the right. He has made it impossible for the court to give him his rights.

But, even if the doctrine of waiver could be extended beyond these cases of necessity, arising from flight and voluntary absence after the trial began, it would not apply in the present instance. The case was conducted from beginning to end as though it were civil litigation, with several suspensions of the trial—once for fourteen days—once for thirty days—and with three months between the argument and the rendition of the judgment. There was in this case, therefore, no compelling necessity, as in those cited in the opinion of the majority. The court accepted the defendant's waiver, as though he alone had an interest

in the method of trial,—ignoring the fact that, as said in the *Hopt Case*, "the public had an interest in his life and liberty."

In order to make this want of necessity clear it will be necessary to state some of the facts as they appear in this record.

The defendant lived in the town of San Carlos in the Province of Occidental Negros. He was charged with having killed Alcanzaren in that municipality. After a preliminary trial he was bound over to answer for the charge of homicide—equivalent to manslaughter and not punishable by death. He gave bond, and was subsequently brought to trial before the Court of First Instance, sitting at Bacolod, which, according to the maps is about 30 miles from San Carlos and on the other side of the Island. The distance between the two places by water is about 100 miles.

Diaz was arraigned and plead "not guilty" September 26, 1906. The case was several times continued, the defendant once or twice consenting. But on August 15, 1907, eleven months after arraignment, the trial began—the defendant and his counsel being present.

Two witnesses for the prosecution were examined. "At the request of the Fiscal the hearing was suspended and an order was issued for the arrest of" three absent witnesses. The record does not show to what date the court adjourned. But fourteen days later it reconvened, the defendant and his counsel again being present. The trial was resumed August 29, 1907, and two witnesses for the prosecution were examined.

The record does not show why the proceedings were again suspended, nor the date to which the court adjourned. But it does appear that after a delay of thirty days the court again reconvened, and that the judge had received a telegram from Diaz. It is copied into the record, and reads as follows:

"SAN CARLOS, *Sept.* 20/07.

Judge JOCSON, Bacolod:

I waive right to be present during examination of government witnesses.

GABRIEL DIAZ."

Other entries of the same date show that "On September 20, 1907, in open court, the Honorable Vincente Jocson of the Tenth District presiding, the Provincial Fiscal and the counsel for defendent being present, the accused himself having waived his right to be present at the trial according to a telegram just received from him, the trial of this case was resumed and Pelagio Carbajosa, a witness for the prosecution, was examined. The prosecution then rested and counsel for defendant only introduced in evidence certified copy of the proceedings," before the Justice Court. ". . . The trial was then adjourned for the purpose of allowing the Fiscal to introduce evidence in rebuttal."

The next day the court again met, the Judge, Provincial and attorney for the defendant being present, "The trial of this case was resumed and . . . a witness for the prosecution was examined in rebuttal. The Fiscal then rested his case and counsel for the accused waived his right to introduce further evidence. Both parties having rested, the Fiscal and counsel for the defendant respectively made their oral argument, and the court declared the trial closed and took the case under advisement."

The court, however, did not adjourn to a given date, nor was there even a provision that the defendant and his counsel should be notified of the time and place when judgment would be entered and sentence pronounced.

The court waited ninety days. It then delivered an opinion, entitled in the case, and dated "Bacolod, Dec. 24, 1907," in which he discussed the evidence, and concluded by finding the defendant guilty and sentencing him to

confinement in the penitentiary for six years and one day.

Notice of this sentence was evidently received by the defendant, because on January 17, 1908, he entered an appeal to the Supreme Court of the Philippines. One of the judges of that court held that "there was no competent evidence to sustain a conviction," but the majority, "notwithstanding the deficiencies and irregularities that are observable in the prosecution of this case," reversed the case, not for the purpose of setting aside the conviction, but solely for the purpose of increasing the penalty. It thereupon sentenced him to a penalty of fourteen years of *reclusion temporal*, with the accessory penalties of Art. 59 of the Penal Code.

From these facts it will be seen that the Philippine Court of First Instance was not in the situation of an American court with a jury impanelled and under the necessity either of proceeding to verdict in the defendant's absence or of discharging the jury and rendering the trial nugatory. It assumed that if Diaz was willing to be absent the court could accept his waiver. The procedure adopted was evidently in accordance with the judge's view of the Spanish law, but in disregard of the fact that, under the Bill of Rights, when the trial began the defendant stood upon his deliverance. There could thereafter be the customary adjournments from day to day, but no suspensions of the trial except "in case of urgent necessity," "and for very plain and obvious causes." *United States* v. *Perez*, 9 Wheat. 579; *Thompson* v. *United States*, 155 U. S. 271, 274.

At common law the trial of felonies was required to be completed at one sitting. Of necessity this rule had to be modified, and adjournments from day to day were finally allowed. There are a few instances in which the case was suspended for a reasonable time, in order to permit the attendance of witnesses who had been unavoidably de-

layed, or for other proper cause, in the discretion of the judge conducting the trial. But without regard to the delay of eleven months between arraignment and trial, the extremest extension heretofore allowed is insignificant by comparison with those here, first for two weeks and then for thirty days. In both these instances the record fails to show that the defendant objected, and it may be that if he can waive the right to be confronted by the witnesses he may waive the guaranty against multiplied jeopardy. For that right is not greater than the right to be present at every stage of the trial.

The court being of the opinion that the defendant need not be present at the trial, it is not surprising that he thought the defendant might also be absent when judgment was rendered and sentence pronounced. It is true that the Philippine Code expressly declares that the defendant "must be personally present at the time of pronouncing judgment if the conviction is for a felony." But that could no more add to the Bill of Rights, than a statute could repeal the requirement that the defendant should be confronted with the witnesses, and be present at every stage of the trial. That the defendant was not personally present is both the legal inference and the natural conclusion from what appears in the record. When the court took the case under advisement on September 21, 1907, it passed no order indicating when the decision would be delivered, even if it had the right to hold the defendant in suspense for days and weeks and months. There was, therefore, no reason for the defendant to be present at Bacolod on December 24, in anticipation that judgment would be entered on that date.

There are cases which hold that where the record shows that the defendant was present when the trial began, there is a presumption that he remains in attendance, and it is not necessary to repeat the statement in the record, from day to day, so as to affirmatively show that

he was present. In the present case the presumption would be the other way, because, having been absent during the last two days of the trial, there is no reason to assume that he was present when, after an indeterminate suspension, the court reconvened. At any rate there is peculiar room for the application of the rule in Federal courts announced in *Lewis* v. *United States*, 146 U. S. 370, 372, that "where the personal presence is necessary in point of law, the record must show the fact."

In my opinion the conviction was not only erroneous because the defendant was not present when the witnesses were examined and argument made, but having been unlawfully put in double jeopardy and judgment equivalent to verdict having been pronounced in his absence, he is entitled to his discharge. *Nolan* v. *State*, 55 Georgia, 521.

It may be that such views would work a radical change in criminal procedure in the Philippines. But when Congress incorporated the language of the Sixth Amendment into the act of July 1, 1902, it must have intended to make just such changes, and to require the trial to be conducted in the American manner, and, among other things, also to prohibit suspensions and undue prolongation of the hearing, so as thereby to prevent the pain and anxiety which must inevitably be suffered by a prisoner who is thus kept on a mental rack.

These considerations compel me to dissent, and to add, that if the effort to review this judgment can lawfully result in having the sentence more than doubled, it imposes a penalty on the exercise of the right, and makes it worse to appeal than to submit to conviction on a record which, the Supreme Court of the Philippines admitted, presented "irregularities and deficiencies."